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Editorial Communications should be addressed to:

THE SECRETARY,

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW,

ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS,

CHATHAM HOUSE,

10, ST. JAMES'S SQUARE, LONDON S.W.1.

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## THE EDITORSHIP

It gives me pleasure to announce that Professor R. Y. Jennings, Whewell Professor of International Law in the University of Cambridge, has accepted an invitation to join me as Co-Editor of the Year Book, beginning with the next number. The Editorial Committee and the Editor here extend to him their welcome and good wishes.

C. H. M. WALDOCK

# CONTENTS

|                                                                                                                                    |     |
|------------------------------------------------------------------------------------------------------------------------------------|-----|
| JUDGE LAUTERPACHT . . . . .                                                                                                        | ix  |
| THE CONCLUSIONS OF INTERNATIONAL CONFERENCES . . . . .                                                                             | i   |
| <i>By</i> D. H. N. JOHNSON                                                                                                         |     |
| THE PROPER LAW OF CONTRACTS CONCLUDED BY INTERNATIONAL PERSONS . . . . .                                                           | 34  |
| <i>By</i> DR. F. A. MANN                                                                                                           |     |
| CONFLICTS OF LAWS IN TIME . . . . .                                                                                                | 58  |
| <i>By</i> J. K. GRODECKI                                                                                                           |     |
| THE INCIDENCE OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES . . . . .                                                                | 83  |
| <i>By</i> T. MERON                                                                                                                 |     |
| THE 1958 GENEVA CONVENTION ON THE CONTINENTAL SHELF                                                                                | 102 |
| <i>By</i> J. A. C. GUTTERIDGE                                                                                                      |     |
| NON LIQUET AND THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY . . . . .                                                        | 124 |
| <i>By</i> PROFESSOR J. STONE                                                                                                       |     |
| FREITAS <i>VERSUS</i> GROTIUS . . . . .                                                                                            | 162 |
| <i>By</i> PROFESSOR C. H. ALEXANDROWICZ                                                                                            |     |
| THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, 1954-9: GENERAL PRINCIPLES AND SOURCES OF INTERNATIONAL LAW . . . . . | 183 |
| <i>By</i> SIR GERALD FITZMAURICE                                                                                                   |     |
| NOTES:                                                                                                                             |     |
| The Mode of Citation of International Court Decisions. <i>By</i> DR. C. W. JENKS                                                   | 232 |
| The Immunity of Embassy Premises. <i>By</i> H. P. ROMBERG                                                                          | 235 |
| Three International Commodity Agreements. <i>By</i> X.                                                                             | 240 |
| Some Recent Applications of International Law by the United States—II.                                                             |     |
| <i>By</i> J. E. S. FAWCETT                                                                                                         | 244 |
| Recognition and Modern Methods of International Co-operation. <i>By</i> PROFESSOR M. LACHS.                                        | 252 |
| DECISIONS OF BRITISH COURTS DURING 1958-9 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW:                              |     |
| A. Public International Law. <i>By</i> A. B. LYONS                                                                                 | 260 |
| B. Private International Law. <i>By</i> P. B. CARTER                                                                               | 265 |
| REVIEWS OF BOOKS:                                                                                                                  |     |
| ALVAREZ, A., <i>Le Droit international nouveau dans ses rapports avec la vie actuelle des peuples</i>                              | 274 |
| Académie de Droit International de la Haye: <i>Recueil des Cours</i> , 1957, vols. 91 and 92                                       | 278 |



|                                                                                                                                                |     |
|------------------------------------------------------------------------------------------------------------------------------------------------|-----|
| <i>Grotius Society Transactions for the Year 1957</i>                                                                                          | 280 |
| DOEHRING, K., <i>Die Pflicht des Staates zur Gewährung diplomatischen Schutzes</i>                                                             | 282 |
| HOLLOWAY, K., <i>Les réserves dans les traités internationaux</i>                                                                              | 283 |
| KAPPELER, D., <i>Les Réserves dans les Traités internationaux</i>                                                                              | 283 |
| JENKS, C. W., <i>The Common Law of Mankind</i>                                                                                                 | 285 |
| ROBERTSON, A. H., <i>European Institutions. Co-operation: Integration: Unification</i>                                                         | 286 |
| SERENI, A. P., <i>Diritto Internazionale</i> , vol. ii: <i>Organizzazione Internazionale. Sezione Prima: Soggetti a Carattere Territoriale</i> | 288 |
| ✱ WORTLEY, B. A., <i>Expropriation in Public International Law</i>                                                                             | 290 |
| AGO, R., GIULIANO, M., ZICCARDI, P., MIGLIAZZA, A., and LUZZATI LENGHI, L. (Editors): <i>Comunicazioni e Studi</i> , vol. ix                   | 292 |
| AMADOR, F. V. GARCIA, <i>The Exploitation and Conservation of the Resources of the Sea: A Study of Contemporary International Law</i>          | 293 |
| BRAVO, L. F., <i>La Prova nel Processo Internazionale</i>                                                                                      | 294 |
| CAHIER, P., <i>Étude des accords de siège conclus entre les organisations internationales et les états où elles résident</i>                   | 295 |
| GREENSPAN, M., <i>The Modern Law of Land Warfare</i>                                                                                           | 296 |
| JESSUP, P. C., <i>The Use of International Law</i>                                                                                             | 299 |
| NERI, S., <i>Sull' Interpretazione dei Trattati nel Diritto Internazionale</i>                                                                 | 302 |
| SALMON, J., <i>Le Rôle des organisations internationales en matière de prêts et d'emprunts</i>                                                 | 303 |
| SIMPSON J. L., and FOX, H., <i>International Arbitration</i>                                                                                   | 305 |
| VITTA, E., <i>Le Riserve nei Trattati</i>                                                                                                      | 307 |
| VITTA, E., <i>Studi sui Trattati</i>                                                                                                           | 307 |
| TABLE OF CASES                                                                                                                                 | 309 |
| INDEX                                                                                                                                          | 312 |

## JUDGE LAUTERPACHT

HIS Excellency, Sir Hersch Lauterpacht, Q.C., LL.D., F.B.A., Judge of the International Court of Justice, died in London after an operation, on 8 May 1960. Reader in the University of London, Whewell Professor at Cambridge, Lecturer at The Hague Academy and Visiting Professor at Universities in the United States, Sir Hersch had a brilliant reputation as a lecturer and teacher. Author of five books of high distinction, Editor of Oppenheim's *International Law* from 1928 onwards, Editor of nineteen volumes of the *Annual Digest of International Law Cases* and *International Law Reports*, Editor between 1944 and 1955 of eleven volumes of this *Year Book*, Member of the International Law Commission and Judge of the International Court, Sir Hersch made a massive contribution to the science, study and development of international law such as will surely give him a permanent place among the great masters of international law.

Publication of this *Year Book* had to be suspended during the critical years 1940-3, and it was Sir Hersch to whom its revival was entrusted in 1944. Beginning with a slim volume in that year, he quickly re-created the *Year Book*, and in the ensuing ten volumes gave to it all the scholarship, ability and enthusiasm with which he was so fully endowed. He found a special pleasure and took special pains in introducing new writers to the *Year Book*, and many contributors, both young and old, owe much to his encouragement and wise guidance. Nor will the present Editor easily forget the generous help given to him by Sir Hersch when it fell to him to succeed Sir Hersch in the editorship.

The death of Sir Hersch when he was still at the summit of his powers and filling the highest judicial office at The Hague is a grave loss to the International Court and to international law. His death is mourned by international lawyers all over the world. At the funeral service, held at the Synagogue in Cambridge on 11 May, an address was given by Mr. Wilfred Jenks. The words then spoken by Mr. Jenks so well express what international lawyers and friends of Sir Hersch feel about him and his work that in the opinion of the Editorial Committee they deserve to be placed on permanent record in the pages of this *Year Book*, to which Sir Hersch himself gave so much. Accordingly, with the consent of Mr. Jenks, the text of the address, as it was delivered at the service, is given below:

We are gathered today, in sadness and humility but with a deep and legitimate pride, to pay our parting tribute to one whom we have all loved, respected and admired—to a warm and staunch friend, a fine scholar, a fearless judge, one of the great international lawyers not only of our own but of any time.

A few brief days ago Hersch Lauterpacht was still with us. Now he belongs to the ages and we remain awhile to pay reverent tribute to the richness of his immortality.

We who were privileged to be counted among his friends know how warm and constant was his friendship, how intense was his passion for righteousness, how steadfast was his personal and public courage, how lightly the weight of his learning lay upon him, and how fundamental was the simplicity and earnestness of his humility.

He leaves behind him her who shared the hopes, labours and difficulties of the young and unknown scholar venturing in what was then a strange land, who shared his early triumphs, who shared his burden of personal sorrow during the years of endurance of his people and his family, who shared in every stage of his successive achievements as scholar, counsellor and judge, and who shared the anxieties and suffering of the last months, weeks and days. He leaves behind also that deepest source of a father's pride, a son worthily pursuing his father's ideal and vocation. To Rachel and to Eli we all extend our deepest and most heartfelt sympathy, and our fervent prayers for them and theirs.

Hersch Lauterpacht leaves in Cambridge, in London, in Geneva, at The Hague, in the United States, in Israel, and indeed throughout the world, a great company of teachers, colleagues, students and friends to whose lives he has given new dimensions and to whom his whole life will always remain an abiding inspiration.

The richness of his intellectual achievement in itself affords an inspiration few lives can offer.

For over thirty years he adapted constantly to a succession of revolutionary changes the most comprehensive treatment of the law of nations available to the student in English, or perhaps in any language. His has been the main burden of garnering from all over the world the wealth of international and national decisions which are progressively transforming the law from formless custom into a firmly established body of authoritative judicial precedent. Any one of his five great books would have established the reputation, and might have exhausted the intellectual vitality, of a scholar of high distinction, and his countless occasional writings illumined and enriched the law.

Hersch Lauterpacht acknowledged, in the things of the mind, under Grotius, two great masters, Hans Kelsen and Arnold McNair, and his own work represents the confluence of speculative philosophy with the abiding vitality of the common law. Therein lies its richness, its strength, and its assurance of immortality.

Of the vision and fearlessness which characterized his all-too-brief service as a Judge of the International Court, and the impact which his judgments have already had and will continue to have on the future of the law and the future of international adjudication, others will speak with authority elsewhere.

Yet exacting as were his standards of scholarship and intellectual integrity, lofty as was his vision of the judicial office, staunch as was his friendship,

devoted as was his affection, it is not solely, or perhaps even primarily, as a scholar, judge and friend that he would have wished to be remembered or that we would wish to remember him. He brought to everything he undertook the moral horizon and stature of the great prophets of his race. He leaves with us, as an imperishable bequest to all who inherit his spirit, a sense of moral purpose, of moral earnestness and of moral urgency which represents the supreme need of our troubled age and world. His belief that the State exists for man and not man for the State, that the moral law applies in the same manner to public as to private conduct, that the use of force for the protection of private interests is alien to, whereas the judicial process is an expression of, the moral nature of man, that right is ultimately the only might, and that the protection of human freedom and human dignity are the only legitimate purpose of law and government, was not an academic conviction but a consuming fire—a fire which has consumed.

Hersch Lauterpacht will be remembered in generations to come as one of those who lit a beacon such as will never be extinguished until the human race has learned to do justice and to love mercy and to walk humbly with its God in a righteous commonwealth built on the brotherhood of man.

This volume was in the hands of the Press when Sir Hersch died. A full notice dealing with his life and work will appear in the next number.





# THE CONCLUSIONS OF INTERNATIONAL CONFERENCES<sup>1</sup>

By D. H. N. JOHNSON, M.A., LL.B.

*Reader in International and Air Law in the University of London*

## INTRODUCTORY

It is proposed to examine in this article what is believed to be a no man's land between the law of treaties and the law relating to international conferences.

The law of treaties, though not necessarily the least controversial, is certainly one of the best known and most heavily documented of all the branches of international law.<sup>2</sup> The law and practice relating to international conferences, being on the border-line between international law and diplomatic practice, naturally receive less treatment in the standard textbooks on international law, although some writers—correctly, it is submitted—deal with treaties and conferences together.<sup>3</sup> Thus, Oppenheim has as a general heading to Part IV of the first volume of his treatise 'International Transactions'. This part is divided into three chapters as follows: Chapter I ('On International Transactions in General'<sup>4</sup>); Chapter II ('Treaties'); and Chapter III ('Important Groups of Treaties'). Similarly, Satow devotes Book III of his *Guide to Diplomatic Practice* to 'International Meetings and Transactions'. In the first chapter of this book he deals with congresses and conferences, and in the remaining chapters with treaties. Fauchille, too, in Part III of the first volume of his treatise, has two adjoining books, one entitled 'Les Négociations — les congrès' and the other entitled 'Les Conventions entre États ou les traités'.

<sup>1</sup> © D. H. N. Johnson, 1960.

<sup>2</sup> It would be otiose to give a bibliography, but mention should be made of the following: Lord McNair, *The Law of Treaties* (1938); *Harvard Research*, 'Law of Treaties', *A.J.I.L.*, 29 (1935), Supplement; International Law Commission, *Reports on the Law of Treaties* by Professor J. L. Brierly (A/CN.4/23, 43, 54 and 54/Corr. 1), Sir Hersch Lauterpacht (A/CN.4/63 and 87), and Sir Gerald Fitzmaurice (A/CN.4/101, 107 and 115); Fauchille, *Traité de droit international public*, vol. 1, part 3 (8th ed. by Bonfils, 1926), pp. 289–512; Rousseau, *Principes généraux du droit international public*, vol. 1 (1944), pp. 125–814; Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd revised edition, 1945), vol. 2, pp. 1369–1558; and Oppenheim, *International Law*, vol. 1 (8th ed. by Lauterpacht, 1955), pp. 877–976. For a select bibliography see *Laws and Practises concerning the Conclusion of Treaties*, published by the United Nations in 1952 (ST/LEG/SER.B/3).

<sup>3</sup> There are, however, a number of valuable monographs on the subject of international conferences. See especially Satow, *International Congresses* (1920) and also *A Guide to Diplomatic Practice* (4th ed. by Sir Nevile Bland, 1957), pp. 303–23; Dunn, *The Practice and Procedure of International Conferences* (1929); Hill, *The Public International Conference* (1929); Pastuhov, *A Guide to the Practice of International Conferences* (1945); and Mastny and Rundstein, 'Procedure of International Conferences' *American Journal of International Law*, 20 (1926), Suppl., pp. 204–21.

<sup>4</sup> Sec. II of this Chapter is entitled 'Congresses and Conferences'.

It may be asked why, if treaties and conferences are thus dealt with together in some of the leading works, it can be said that any no man's land exists between them. The explanation lies to some extent in the difficulty in stating any clear law, as opposed to practice, in regard to international conferences, and therefore in defining the scope of any such law. Indeed, it might not be altogether fanciful to subsume the whole of the law relating to international conferences under some such heading as the 'sovereign equality' of States, meaning (i) that, if all the States represented at a conference are in agreement, there is no limit to their powers provided that they do not transgress the rights of States not represented; and (ii) that a majority of States cannot bind a minority.<sup>1</sup>

Another, and possibly more fruitful, explanation lies in certain ambiguities arising under the law of treaties. These ambiguities will be considered shortly in a preliminary way. No attempt, however, will be made to state any conclusions until the practice of some of the principal international conferences of recent times has been examined. In order that this examination may be as concentrated as possible, it will be confined to three of the great law-making conferences of the last half-century, namely, the London Naval Conference, 1908-9; The Hague Codification Conference, 1930; and the Geneva Conference on the Law of the Sea, 1958.

#### SOME AMBIGUITIES IN THE LAW OF TREATIES

The first problem involved in considering the law of treaties surrounds the meaning of the word 'treaty' itself. For the word has two distinct meanings, the one generic and the other specific. In the generic sense, the word 'treaty' comprehends all international agreements, by whatever name these are called, whether convention, declaration, protocol, &c., including 'treaty' in the specific sense. In its specific sense, naturally enough, the word 'treaty' refers to a particular type of international agreement that is actually called a 'treaty'.

It might seem that an obvious way out of this difficulty would be to use 'treaty' in the specific sense only, and to use 'agreement' as the generic term. But, apart from the fact that the 'law of treaties' is a term sanctioned by long usage, this simple solution is precluded by the fact that the word 'agreement' itself is frequently used in the specific sense as well as in the

<sup>1</sup> It may be relevant to refer at this point to the view of one authority that international law can be reduced to seven fundamental principles, namely, the principle of sovereignty, the principle of recognition, the principle of consent, the principle of good faith, the principle of self-defence, the principle of international responsibility and the principle of the freedom of the seas (Schwarzenberger, in *Recueil des Cours*, 87 (1955—I), p. 195). It is evident that, if this view be taken, the first four principles at least are relevant to the problems that arise when sovereign States are assembled together in conference.

generic sense. It seems therefore best to ignore this terminological difficulty and to proceed.

The second problem is, however, more substantial. It concerns the very nature of a 'treaty' in the generic sense. According to Lord McNair, 'the word "treaty" denotes a *genus* which includes the many differently named instruments in which States, or the Heads or the Governments of States, embody international (including therein inter-Governmental) agreements'.<sup>1</sup> Article 1 (a) of the Harvard Draft Convention of 1935 provides that 'A treaty is a formal instrument of agreement by which two or more States seek to establish a relation under international law between themselves'. Professor Brierly's definition is similar, a treaty according to him being 'an agreement recorded in writing between two or more States or international organizations which establishes a relation under international law between the parties thereto'.<sup>2</sup> Sir Hersch Lauterpacht, as special rapporteur of the International Law Commission, defined treaties as 'agreements between States, including organizations of States, intended to create legal rights and obligations of the parties'.<sup>3</sup> The definition drawn up by Sir Gerald Fitzmaurice, as the third successive United Kingdom special rapporteur on the subject for the International Law Commission, is not only the most recent, but also the most elaborate, being as follows: 'A treaty is an international agreement embodied in a single formal instrument (whatever its name, title or designation) made between entities both or all of which are subjects of international law possessed of international personality and treaty-making capacity, and intended to create rights and obligations, or to establish relationships, governed by international law'.<sup>4</sup>

We may ignore minor differences between these definitions<sup>5</sup> and concentrate on the essential feature which they all, or nearly all, appear to have in common. This is that a treaty, in the generic sense, records an

<sup>1</sup> Op. cit., p. 3.

<sup>2</sup> A/CN.4/23.

<sup>3</sup> A/CN.4/63. The definition given by the same authority as editor of Oppenheim's *International Law* is similar, being as follows: 'International treaties are agreements, of a contractual character, between States, or organisations of States, creating legal rights and obligations between the Parties' (op. cit., vol. 1, 8th ed., p. 877).

<sup>4</sup> A/CN.4/101. It may be noted that the phrase 'intended to create rights and obligations' stems from Sir Hersch Lauterpacht, whereas the Harvard Draft Convention and Professor Brierly emphasize rather 'the establishment of relationships'. Perhaps in order to be on the safe side, Sir Gerald Fitzmaurice has included both ideas in his definition, explaining that he has reintroduced the phrase 'intended to establish relationships' included by Brierly but dropped by Lauterpacht 'because it seems difficult to refuse the designation of treaty to an instrument—such as for instance a treaty of peace and amity or of alliance—even if it only establishes a bare relationship, and leaves the consequences to rest on the basis of an implication as to the rights and obligations involved, without these being expressed in any definite articles'. The present writer does not consider there is much significance in these different points of view since he finds it difficult to conceive of a legal relationship that does not create for the parties legal rights and obligations.

<sup>5</sup> Such as the question whether the word 'treaty' is properly used of the agreement itself or of the instrument in which the agreement is recorded.



#### 4 CONCLUSIONS OF INTERNATIONAL CONFERENCES

agreement between subjects of international law that is intended to create rights and obligations governed by international law.

If, then, the essence of a treaty is that it creates for the parties legal rights and obligations, the question whether a treaty exists or not may well resolve itself into the question whether the particular instrument does or does not create these legal rights and obligations. This question, going as it does to the very root of international law, may well be extremely difficult to answer.<sup>1</sup> This matter was treated at some length by Sir Hersch Lauterpacht in his first report for the International Law Commission. He began by contrasting treaties with 'formal international instruments solemnly declared or signed by representatives of States or unilaterally proclaimed by them which, however, are in the nature of statements of policy rather than instruments intended to lay down legal rights and obligations'. Among these formal international instruments that are not treaties he included such well-known instruments as the Atlantic Charter of 1941 and the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948. He considered, however, that 'the fact that the obligation provided for in the instrument can be fulfilled by a somewhat nominal act of the parties does not necessarily detract from its character as a treaty' and therefore that an agreement under which the parties pledge themselves to consult each other or to negotiate can nevertheless amount to a treaty. The same applied, in his view, to an agreement such as the North Atlantic Treaty of 4 April 1949, in Article 5 of which each party agreed to assist the others by 'such action as it deems necessary, including the use of armed force', in the event of an armed attack against one or more of them in Europe or North America.<sup>2</sup>

Returning to the point in his second report for the International Law Commission, Sir Hersch Lauterpacht rejected the view that an instrument does not constitute an international treaty unless it contains provisions for the compulsory judicial or arbitral settlement of disputes as to its interpretation or application.<sup>3</sup> He added, however, the observation that registration of the instrument with the United Nations, though a factor of some importance from the evidential point of view, is not decisive on

<sup>1</sup> See Brierly, *The Basis of Obligation in International Law* (1958).

<sup>2</sup> In his report to the International Law Commission, Sir Hersch Lauterpacht expressed the view that a State which signed the Optional Clause subject to a reservation of disputes essentially within the domestic jurisdiction of that State as determined by that State could be said to have undertaken a legal obligation since the determination of the question whether the matter concerned did or did not fall essentially within the domestic jurisdiction of that State 'must take place in accordance with the implied obligation to act in good faith' (A/CN.4/63, p. 25). But, in his Individual Opinion in the *Norwegian Loans* case (I.C.J. Reports, 1957, pp. 9, 52), he said that 'In the light of further study of this question in connection with the present case, I do not feel it possible to adhere to that view'.

<sup>3</sup> A/CN.4/87, p. 10. The view referred to was put forward by J. E. S. Fawcett in this *Year Book*, 30 (1953), p. 381.

the question whether the instrument is a treaty or not since 'it cannot be admitted that the Secretary-General can be entrusted with the function of giving, by complying with the request for registration, the complexion of a legal instrument to something which otherwise would not possess that character'.

Sufficient has now been said to prove that it may be no easy task to determine whether a particular instrument, whatever its formal designation, constitutes in substance a treaty or not. The question therefore arises whether the form given to the conclusions of international conferences is of any significance. There are some suggestions that it is not. For instance, in his definition of a treaty, Sir Gerald Fitzmaurice refers to 'an international agreement embodied in a single formal instrument (whatever its name, title or designation). . .'. If this definition were taken literally, and perhaps somewhat wrenched out of its context, it might be taken to mean that, once the 'formality' of an instrument had been established, the nature of that form (name, title or designation) was a matter of no consequence. Support for this view might be found in a passage which occurs in the Advisory Opinion given by the Permanent Court of International Justice in the *Austro-German Customs Régime* case, where the Court said: 'From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols or exchanges of notes.'<sup>1</sup> The Court could, if it had wished, have mentioned many other forms.<sup>2</sup>

Is it therefore immaterial what name, title or designation the parties give to the instrument in which they record their agreement? It is here that we reach the root of the problem because it is obvious that, if the parties go to very great lengths to explain precisely the purpose, scope and manner of operation of their agreement, it will make very little difference what they call it. But if—and this is usually the case—the parties are unwilling, or perhaps not sufficiently in accord, to go to that degree of trouble, then the form in which they express their conclusions may be a matter of some importance. This is not to deny the view of the authorities just mentioned that an instrument designated under one name may have just as much (or as little) obligatory character as an instrument designated under another name. It is possible, however, for the obligatory character of different instruments to operate in different ways.<sup>3</sup> For example, one

<sup>1</sup> *P.C.I.J.*, Series A/B, No. 41, p. 47.

<sup>2</sup> See the valuable article entitled 'The Names and Scope of Treaties' by Denys P. Myers in *American Journal of International Law*, 51 (1957), p. 574.

<sup>3</sup> According to an authority on international conferences, 'The final results of a conference . . . are often embodied in a formal compact which may be termed Treaty, Pact, Convention, Agreement, Protocol, Protocol of Signature, General Act, Final Act, etc. . . . There is no definite and generally valid terminology allowing for a clear differentiation between these various types of

instrument may oblige as a statement of existing law (*lex lata*); another instrument may oblige as a source of new law (*lex ferenda*). One instrument may oblige merely upon signature, another may oblige only upon ratification. One instrument may be capable of denunciation and another not so. Instruments may also vary in the effect which their conclusion has upon third parties. Finally, instruments may differ not merely in kind but also in degree. Thus, we may distinguish between instruments intended to embody legal obligations and those not so intended (e.g. differences of kind). Also, however, among instruments that are intended to embody legal obligations (i.e. treaties), there may be variations as to the extent to which it was intended to enter into legal obligations (e.g. differences of degree). In assessing these variations, questions of form may become important. It is possible, therefore, that the problem of designation is one to which the parties to an international instrument cannot afford to be entirely indifferent. As we have already seen, it may be difficult to determine whether, in regard to a particular instrument, the parties intended to create legal rights and obligations or not; and, therefore, whether they intended to make of that instrument a 'treaty' or not. In order to answer such a question it may be necessary to seek evidence of the intention of the parties as expressed in the preparatory work. The decision of the parties to embody the results of their deliberations in one or another form may constitute particularly valuable evidence of their intentions. Working backwards from the law of treaties, therefore, there can scarcely be any doubt that the particular form chosen to express the conclusions of international conferences is a subject worthy of study.

Equally, from the point of view of the law and practice of international conferences, it is desirable that the delegates to such conferences should, at an early stage of their deliberations, be clearly apprised of the fact that the form in which they express their conclusions may be of scarcely less importance than the substance of those same conclusions. It is because it is believed that this matter is apt to give rise to considerable difficulties at international conferences that this exploratory and admittedly somewhat tentative study has been undertaken.

#### THE LONDON NAVAL CONFERENCE, 1908-9

The origin of this Conference lay in the proposal to establish an International Prize Court, which had been accepted by the Second Hague Peace Conference in 1907. Convention No. XII, adopted by that Conference and entitled 'Convention relative to the Establishment of an International Prize Court', provided for appeals against the decisions of national prize courts to be submitted to an International Prize Court, the judges international instruments, though usage and practice make certain distinctions which are more or less accepted' (Pastuhov, *op. cit.*, p. 166).



and deputy judges of which were to be appointed by the Contracting Powers. In particular, Article 7 provided that 'If the question of law to be decided is covered by a Treaty in force between the belligerent captor and a Power which is itself, or whose national is, a party to the proceedings, the Court is governed by the provisions of the said Treaty'. But, the article continued, 'In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.'

It soon became evident that Convention No. XII stood little chance of being ratified unless some general agreement could be reached on the rules of international law which the International Prize Court would apply in the absence of specific treaty provisions binding the actual parties to the dispute. In recognition of this, Sir Edward Grey wrote on 27 February 1908 to the British representatives at Berlin, Madrid, Paris, Rome, St. Petersburg, Tokio, Vienna and Washington—and later The Hague—instructing them to propose to the Governments in those cities that 'another conference should assemble during the autumn of the present year, with the object of arriving at an agreement as to what are the generally recognized principles of international law, within the meaning of paragraph 2 of Article 7 of the [Hague] Convention'.<sup>1</sup>

Favourable replies having been received, the British Government undertook the preparation of the Conference and, as part of the task of preparation, issued on 14 November 1908 a document which was of considerable importance from the point of view not only of the London Conference itself but also of conference procedure in general. In this document<sup>2</sup> the British Government stated the objectives of the proposed conference as being the arrival at an agreement on the generally recognized principles of international law within the meaning of Article 7 (2) of Convention No. XII and the drawing up in a 'declaration' of the principles which the Court would apply between States in the absence of specific treaty provisions.

The document continued as follows:

'La "déclaration" proposée doit avoir pour objet d'énoncer, avec le plus de précision possible, les points sur lesquels il y a identité entre les principes suivis et même, s'il y a lieu, entre leur application pratique, ainsi que les points sur lesquels l'expérience acquise et la communauté des conditions modernes du commerce maritime, de la navigation et de la guerre navale permettent aujourd'hui d'exprimer les principes généraux du droit international, qui se sont fait jour peu à peu à travers les errements

<sup>1</sup> Miscellaneous No. 4 (1909), p. 1.

<sup>2</sup> *Exposé des vues exprimées par les Puissances dans leurs mémorandums et observations destinées à servir de base aux délibérations de la Conférence*, Miscellaneous No. 5 (1909), p. 57. The document was drawn up in French and, when quoting from it, it seems best to quote from the original French.



## 8 CONCLUSIONS OF INTERNATIONAL CONFERENCES

séparément suivis dans chaque pays. Il ne s'agit donc pas à cet égard pour la Conférence de statuer *de lege ferenda*, comme les Conférences de la Paix ont été ou seront appelées à le faire en vue de développer le domaine des stipulations conventionnelles internationales.

'A la différence d'une "convention", créant des règles particulières aux États Contractants, la "déclaration" projetée doit être, dans l'opinion du Gouvernement de Sa Majesté, la reconnaissance par les Puissances les mieux qualifiées et les plus intéressées, délibérant en commun, que, dans l'état actuel des relations mondiales, il existe véritablement un droit commun des nations, dont elle entend dégager les principes dans l'intérêt de tous. La force obligatoire de ce droit commun a été constatée par l'article 7 de la Convention de La Haye précitée.<sup>1</sup>

'A la différence encore d'une Convention, qui ne saurait être modifiée que par de nouvelles stipulations, les règles reconnues aujourd'hui pourront être appliquées ou développées, le cas échéant, avec telles modifications que la Cour trouvera nécessaires pour donner aux principes leur vraie portée en présence des progrès du jour.'

No doubt it would be wrong to attach too much significance to the expression of the views of a single Government on a single occasion. Equally, however, it would be absurd to ignore the fact that the London Naval Conference was, by modern standards, exceptionally well prepared and organized; that the drafting committee of the Conference paid tribute to the British Government's valuable preparatory work;<sup>2</sup> that the French Government placed the services of the eminent jurist, M. Fromageot, at the disposal of the British Government for the purposes of this work;<sup>3</sup> and that the Conference, by its action in adopting the Declaration of London, to that extent endorsed the approach of the British Government. It may, therefore, be apposite to attempt to summarize the views put forward by the British Government in their document of 14 November 1908:

- (i) Whereas a convention is a suitable form for expressing agreements arrived at between a number of Governments concerning rules of international law that will apply between them in the future (i.e. *lex ferenda*),<sup>4</sup> a declaration is the appropriate form when it is a question of stating the existing rules of customary international law (i.e. *lex lata*).
- (ii) Whereas the rules enacted in a convention can be modified only by the unanimous consent of all the parties to the convention, the fact

<sup>1</sup> i.e. Convention No. XII of 1907.

<sup>2</sup> For the report of the drafting committee see Miscellaneous No. 5 (1909), p. 342 for the original French version, or Miscellaneous No. 4 (1909), p. 33 for the English translation.

<sup>3</sup> See the report of the British Delegates to the Conference to Sir Edward Grey (Miscellaneous No. 4 (1909), p. 93). The legal adviser to the British delegation was Sir Cecil Hurst.

<sup>4</sup> The British Government do not seem, however, to have committed themselves to the view that there is anything improper in using a convention for the purpose of confirming existing law. In fact, the scheme was that the London Conference would enunciate in the form of a declaration the generally recognized rules of international law which had been confirmed by the parties in Convention No. XII of 1907.

that customary rules of law are at a given moment written down in a declaration will not necessarily result in those rules being immutably fixed at that point. The rules may continue to develop according to the normal processes for the development of customary law, their enactment in the declaration notwithstanding.

So far so good. A number of important points, however, remain unanswered. From the nature of a convention, as stated above, we may reasonably deduce that a convention binds only the parties to it; and that, if a convention is made subject to ratification, it has no formal legal effect until ratified. But what is the position in regard to a declaration? If a declaration—as seems to be suggested—consists of a statement of existing rules of law, why does it need to be ratified at all? Is it not already binding, without ratification? Moreover, if the declaration accurately states existing law, does it not bind all States as well as those States whose representatives actually sign it? Does not the very nature of a declaration render reservations juridically impossible? How can a State, by purporting to make reservations, contract out of existing law? If a declaration merely states existing law, is it right that it should contain a denunciation clause?

The report of the drafting committee of the London Naval Conference clears up some, but only some, of these uncertainties.<sup>1</sup> Referring to the Declaration of London, this committee asked itself this question: 'What is the scope of application of the rules thus laid down?' It answered the question as follows:

'They [the rules] must be observed in the relations between the signatory parties, since those parties acknowledge them as principles of recognized international law and, besides, expressly bind themselves to secure the benefit of them for one another. The Signatory Powers who are or will be parties to the Convention establishing the International Prize Court will have, besides, an opportunity of having these rules applied to disputes in which they are concerned, whether the Court regards them as generally recognized rules, or takes account of the pledge given to observe them. It is, moreover, to be hoped that these rules will before long be accepted by the majority of States, who will recognize the advantage of substituting exact provisions for more or less indefinite usages which tend to give rise to controversy.'<sup>2</sup>

This seems to amount to an admission that, although '*les Puissances les mieux qualifiées et les plus intéressées*'—to use the British Government's expression—may have the right, and even perhaps the duty, to clarify rules of existing customary law by enacting them in the form of a treaty, the treaty which emerges from their common deliberations does not

<sup>1</sup> The rapporteur of the drafting committee was M. Louis Renault of France, who was also chairman and rapporteur of the Grand Committee and the Examining Committee. Other members of the drafting committee included Sir Cecil Hurst (Great Britain) and Professor George Grafton Wilson (United States).

<sup>2</sup> Citation from the English translation of the committee's report, Miscellaneous No. 4 (1909), p. 34.

in itself bind non-signatory States. The binding force of that document as such derives solely from the consent of the States which have signed—and, if necessary, ratified—its text.

That this is the correct interpretation of the drafting committee's report seems to be confirmed by its immediately following statement to the effect that, since unanimity could not be reached on two controversial points (conversion of merchant ships into warships on the high seas and the question whether the nationality or the domicile of the owner should be adopted as the dominant factor in deciding whether property is enemy property) proposals relating to those points could not be proceeded with.<sup>1</sup> Thus, however much in theory a 'Declaration' may confine itself to restating existing law, in practice its effect is wider than that since, for the parties, it becomes a new source of law independent of the basis in custom. Even an unsuccessful attempt to adopt a declaration may be not without significance because, if the attempt to 'substitute exact provisions for more or less indefinite usages which tend to give rise to controversy' fails, those usages may become even more indefinite and liable to provoke controversy than they were before. Therefore, notwithstanding its theoretical basis as a restatement of existing law, a declaration, no less than a convention which avowedly enacts new rules *de lege ferenda*, tends to be the result of a bargain in which concessions are made by the parties on all sides. Certainly this was the case with the Declaration of London. As the drafting committee reported:

'The solutions have been extracted from the various views or practices which prevail, and represent what may be called the *media sententia*. They are not always in absolute agreement with the views peculiar to each country, but they shock the essential ideas of none. They must not be examined separately, but as a whole, otherwise there is a risk of the most serious misunderstandings. . . . The work is one of compromise and mutual concessions.'

As if to emphasize this point, Article 65 stated: 'The provisions of the present Declaration must be treated as a whole, and cannot be separated.' In explanation of this provision, the drafting committee said:

'This Article is of great importance. . . . The rules contained in the present Declaration relate to matters of great importance and diversity. They have not all been accepted with the same degree of eagerness by all the Delegations. Concessions have been made on one point in consideration of concessions obtained on another. The whole, all things considered, has been recognized as satisfactory, and a legitimate expectation would be falsified if one Power might make reservations on a rule to which another Power attached particular importance.'

There is no denying the practical wisdom of the committee. At the same time, if the Declaration of London had really been what it purported to be,

<sup>1</sup> The London Naval Conference was of course operating under the rule of unanimity.



namely, a statement of the existing customary law, it would hardly have been possible to argue that its provisions were inseparable. In those circumstances, an inaccurate statement of the law in one article could hardly have detracted from the value of all the other articles.

The Conference closed its proceedings on 26 February 1909 with the signature by the principal delegates of the *Protocole de Clôture* (Final Protocol). This began by simply reciting the fact that the London Naval Conference had met at the Foreign Office on 4 December 1908, at the invitation of the British Government, with a view to determining the generally recognized principles of international law within the meaning of the Convention Relative to the Establishment of an International Prize Court signed at The Hague on 18 October 1907. The *Protocole* continued by mentioning the names of the delegates attending the Conference and then stated that, after a series of meetings, the Conference had drawn up, for signature by the plenipotentiaries, the *Déclaration relative au droit de la guerre maritime*, of which the text was annexed to the *Protocole*. The latter also contained the text of a *vœu*, in which the delegates of the Powers represented at the Conference, which had either signed or expressed the intention of signing the Convention Relative to the Establishment of an International Prize Court, agreed to suggest to their respective Governments the advantage of providing a system under which the States concerned could ratify that Convention subject to a certain reservation.

The Declaration of London itself was signed separately and was made subject to ratification. As is well known, it was never ratified and never came formally into force, largely because of the opposition of the House of Lords. It was not, however, entirely without effect and, at the beginning of the First World War, several of its principles were incorporated in the instructions by the belligerents to their respective navies.<sup>1</sup>

#### THE HAGUE CODIFICATION CONFERENCE, 1930

The Conference for the Codification of International Law met at The Hague from 13 March to 12 April 1930. It was convened as the result of a resolution of the Council of the League of Nations in accordance with a recommendation of the Assembly of the League. Its task was to codify the rules of international law in regard to Nationality, Territorial Waters and the Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners.

<sup>1</sup> This is scarcely surprising since the Preamble of the Declaration contained a 'Preliminary Provision' in which it was stated that 'The Signatory Powers are agreed that the rules contained in the following Chapters correspond in substance with the generally recognized principles of international law'. On 7 July 1916, however, the British and French Governments formally abandoned any pretence that they were following the principles of the Declaration of London (Colombos, *The International Law of the Sea*, 3rd revised ed., 1954, p. 367).



Draft rules of procedure for the Conference were drawn up by a preparatory committee, whose members included Professor Basdevant (France), Professor François (Netherlands) and Sir Cecil Hurst (Great Britain).<sup>1</sup> The committee proposed that the Conference should establish three main committees, one for each item on the agenda, and that any act intended to form part of the work of the Conference should first be prepared and voted on by the competent committee (rules 6 and 15). In the committees it would suffice if a proposal was supported by a majority of the delegations present at the meeting, although it was also provided that, if a majority of the delegations represented on the committee were not present when the vote was taken, a new vote should be taken if asked for by ten delegations. (rule 18). If a committee could not reach unanimous agreement on all points, it was to incorporate the provisions upon which it had unanimously agreed in a special instrument. It was to formulate separately those provisions which had obtained the assent of the majority of the delegations and it was also given the power to 'establish the terms of a Declaration setting forth the principles regarded at least by a majority of the delegations represented on the Committee as the expression of existing international law' (rule 20). In so far as the Conference itself arrived at a unanimous agreement, the act embodying such agreement was to be signed by all the delegations, subject to ratification (rule 23). In the absence of, or in addition to, a unanimous agreement, conventions were to be signed, as acts of the Conference, provided that the object of the convention came within the competence of the conference and provided they were finally adopted by a vote of the majority of the Members of the League of Nations and non-member States represented on the committee in which the draft was prepared. These conventions were to be open to accession by any State; and the period of validity and, if necessary, the method of revision, were to be specified in the convention (rule 24). Finally, rule 25 provided:

'Declarations by which the signatory Governments will recognise certain principles as being sanctioned by existing international law may also be signed as acts of the Conference, provided the said Declarations have been finally adopted by a vote of a majority of the Members of the League of Nations and non-member States represented on the Committee in which the draft was prepared. These Declarations, which shall be subject to ratification, shall be open for accession; they shall not specify any period of validity or contain any denunciation clause, and they shall lapse if the rules which they enunciate cease to form part of international law.'

This was an unusually elaborate scheme to put forward by way of draft rules of procedure, and it is not surprising that it ran into a good deal of opposition when the Conference met. It is interesting, however, to consider exactly what the committee were proposing. Their proposals may be summarized as follows. They suggested that the Conference should, in

<sup>1</sup> C.190(1). M.93. 1929.V.

general, operate according to the rule of unanimity, and draft rule 23 was devised in such a way as to give the Conference complete latitude in regard to any 'acts' that might flow from such unanimous agreement. Being realists, however, they wished to provide for a situation in which unanimity might not be achieved. Here they drew a distinction between conventions (rule 24) and declarations (rule 25). Conventions, presumably intended to be confined to matters *de lege ferenda*, could be adopted by an absolute majority of the States represented on the committee in which the draft was prepared although, at the committee stage itself, it might suffice if a mere majority of the delegations represented at the meeting were in favour. The Conference could also, by an absolute majority of the States represented on the committee in which the draft was prepared, adopt declarations in which the signatory Governments would recognize certain principles as being sanctioned by existing international law. While these declarations, no less than the conventions, were to be subject to ratification and accession, they were—unlike the conventions—to contain no provisions concerning their period of validity and, in particular, no denunciation clause. Again, unlike the conventions, they were to lapse if the rules which they enunciated ceased to form part of international law.

Certain ideas are clearly common to these proposals and the document prepared by the British Government on 14 November 1908. There is, for instance, the same contrast between conventions and declarations, the former being regarded as suitable for drawing up rules *de lege ferenda* and the latter for enunciating existing rules, *de lege lata*. There is also the same suggestion that, whereas a convention can only be modified by the parties to it, a declaration can be modified or even lapse if the rules of international law which it enunciates themselves change. Whereas, however, Article 69 of the Declaration of London provided that the Declaration could be denounced twelve years after ratification, it was proposed that the declarations to be adopted by The Hague Conference should contain no denunciation clause.

Opening the proceedings, the President of the Conference (M. Heemskerck of the Netherlands) drew attention at once to the fact that, whereas most of the draft rules were likely to be uncontroversial, this was not the case with regard to the proposals just mentioned. M. Giannini, the Italian delegate, objected that the draft rules would tie the hands of the committees too much and suggested that each committee should be allowed to discover for itself the form in which an agreement could be reached. M. Alvarez (Chile) and M. de Visscher (Belgium), while expressing certain doubts as to the draft rules, thought it would be best to let the committees get down to work before taking a definite decision on the rules. However, M. Guerrero (Salvador) thought that the work of the committees would be paralysed

unless they knew in advance what form the decisions of the Conference would take, and M. Rolin (Belgium) wisely warned that these questions of form were too serious to be left to the last moment. On the suggestion of the President, it was decided to refer the controversial rules to the Bureau of the Conference, consisting of the President himself, the three vice-presidents and the chairmen of the three committees.<sup>1</sup>

The rules of procedure finally adopted by the Conference differ considerably from those proposed by the preparatory committee, and the differences are interesting. Rule 20, as amended, provided *inter alia* that each committee might draw up one or more draft conventions or protocols and might formulate recommendations or *voeux*; that the committees might embody in the draft conventions or protocols any provisions which had been finally voted by a majority containing at least two-thirds of the delegations present at the meeting at which the vote took place; that, in the case of provisions which had secured only a simple majority, a committee, at the request of at least five delegations, might decide by a simple majority whether such provisions were to be made the object of a special protocol; that provisions adopted by the committees (whether by a two-thirds majority or a simple majority) but not embodied in draft conventions or protocols, should be inserted in the Final Act of the Conference; and that recommendations and *voeux* might be adopted by a simple majority. Rule 23, as amended, provided that 'The draft conventions and protocols, recommendations and *voeux* presented by the Committees may be adopted by the Conference by the vote of the simple majority of the delegations present at the meeting at which the vote takes place'; and Rule 24, as amended, provided that:

'The Final Act of the Conference shall contain:

- (a) A statement of the conventions and protocols opened for signature or accession;
- (b) The provisions referred to . . . in Article 20 . . . which have not been embodied in such conventions or protocols;
- (c) Recommendations and *voeux* which are adopted.'

Rule 25 (i.e. the provision for declarations in which Governments would recognize certain principles as being sanctioned by existing international law and sign such declarations as acts of the Conference) was deleted, as was the reference to declarations in draft rule 20.

In accordance with these provisions The Hague Conference adopted its Final Act on 12 April 1930. This referred to a convention, two protocols, a special protocol and eight resolutions dealing with questions of nationality and statelessness;<sup>2</sup> to a resolution on the territorial sea, to which were

<sup>1</sup> *Acts of the Conference for the Codification of International Law*, vol. 1, Plenary Meetings, C.351. M.145. 1930. V.

<sup>2</sup> The text of the convention was adopted unanimously by the First Committee; those of the



annexed thirteen articles 'dealing with the legal status of the territorial sea, which have been drawn up and provisionally approved with a view to their possible incorporation in a general convention on the territorial sea'; to two recommendations concerning respectively Inland Waters and the Protection of Fisheries; and to four recommendations with a view to the progressive codification of international law.

This rather untidy result was generally due to the fact that the Conference was attempting to deal in too short a time with three entirely different branches of international law, all of them in varying degrees of 'ripeness' for codification. Also, some of the difficulties confronting the Conference—in particular, the arguments over the adoption of the rules of procedure—can be ascribed to uncertainty as to the voting procedures which should be followed. The rule of unanimity was still the basic rule in international conferences and was enshrined (though with important exceptions) in the Covenant itself. Yet, while there was a general feeling that in a conference whose task was to codify international law some departure from the rule of unanimity was essential, opinions differed as to what form this departure should take. Thus, while the preparatory committee envisaged in the main decisions taken in committees by simple majorities and in the plenary by unanimous agreement (with provision for decisions in some cases by simple majorities), the Conference itself adopted rules which provided in the main for decisions in the committees by majorities of two-thirds and in the plenary by simple majorities.

Bound up with, and as it were superimposed on, the controversy over voting procedures, which does not really concern us, was the controversy over the forms which should be given to the results of the work of the Conference. To this controversy, which is very relevant to the present article, we owe the distinction, indicated though never fully explained in the rules of procedure, between the Final Act itself and conventions, protocols, special protocols, recommendations and *vœux*. There was, however, one really definite result which emerged from this controversy. This was the antipathy of governments as a whole to the conception of declarations purporting to state principles of existing law which, while subject to the ratification of the States becoming parties to them, could nevertheless be adopted by a majority of States only; and which, while they could not be denounced by the States parties to them, could nevertheless lapse as the consequence of events outside the control of those same parties. To quote Professor Hudson: 'Sentiment grew quite rapidly against any attempt to state what was the existing law as distinguished from new legislation, and after two weeks it became clear that even the use of the

two protocols by a majority of more than two-thirds of the delegations present; and that of the special protocol by a simple majority.



term *declaration* was stoutly opposed. The discussion in the lobbies of the difference between conventions and declarations was quite interesting.<sup>1</sup> Unfortunately, Professor Hudson does not summarize for us these lobby discussions. Such a summary might well have saved much trouble at the Geneva Conference on the Law of the Sea twenty-eight years later.

## THE GENEVA CONFERENCE ON THE LAW OF THE SEA, 1958<sup>2</sup>

### *General Organization*

The First United Nations Conference on the Law of the Sea met in Geneva from 24 February to 27 April 1958. It was convened by the General Assembly of the United Nations in order (i) 'to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate', and (ii) 'to study the question of free access to the sea of land-locked countries, as established by international practice or treaties'.<sup>3</sup> The decision to convene the Conference was taken on the recommendation of the International Law Commission which, having decided in 1949 that both the régime of the high seas and the régime of the territorial sea were topics whose codification was necessary and feasible, had been studying the former subject on its own initiative since 1950 and the latter, at the request of the General Assembly since 1951.<sup>4</sup> The Commission, in its report covering the work of its eighth session (1956),<sup>5</sup> had explained that, in preparing its rules on the law of the sea, it had found it impossible to apply the distinction, made in article 15 of its Statute,<sup>6</sup> between 'codification' and 'progressive development'. 'In these circumstances,' the Commission said, 'in order to give effect to the project as a whole, it will be necessary to have recourse to conventional means.'

It is unfortunate that this extremely important recommendation was cast in such cryptic terms. It must, however, be taken to mean that, when the Commission prepares a draft that amounts either wholly or in part to a progressive development of international law, a convention is considered

<sup>1</sup> *American Journal of International Law*, 24 (1930), p. 449.

<sup>2</sup> The present writer was a member of the United Kingdom delegation to the Conference. The views expressed here, however, are completely unofficial.

<sup>3</sup> Resolution 1105 (XI) of 21 February 1957.

<sup>4</sup> For a description of the preparation of the Conference see *International and Comparative Law Quarterly*, 8 (1959), p. 122.

<sup>5</sup> A/3159.

<sup>6</sup> Article 15 of the Statute defines 'progressive development' as 'the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States' and 'codification' as 'the more precise formulation and systematisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'. Unless the contrary is indicated, the word 'codification' is used in this sense in this article.

to be the most appropriate means for giving effect to the draft. But, in the event of a draft amounting wholly to a codification of international law, we are not told what would be the suitable means for giving effect to it. Perhaps the Commission, in view of its experience in attempting to prepare rules on the law of the sea, thought such a contingency too remote to be taken seriously.

In the resolution providing for the Conference, the General Assembly also authorized the Secretary-General to invite appropriate experts to advise and assist the Secretariat in preparing the Conference, with terms of reference which included presenting 'to the Conference recommendations concerning its method of work and procedures, and other questions of an administrative nature'. Profiting no doubt from the experience of The Hague Conference, the Secretariat wisely refrained from attempting to provide in the draft rules of procedure for the forms in which the Conference might eventually wish to express the results of its work. But, in paragraph 12 of a report entitled *Method of Work and Procedures of the Conference: Report of the Secretary-General*,<sup>1</sup> the Secretariat stated: 'The number and diversity of the problems with which the Conference will have to deal seem to require that it should be free to adopt a number of different kinds of instruments according to its discretion, and should not necessarily try to compress all the results of its work in a single instrument. At the same time the possibility of a single instrument should not be excluded, if the Conference deems such a solution to be preferable.' In paragraph 27 of the same report the Secretariat stated: 'Since, as already indicated in paragraph 12, the Conference should have complete liberty in deciding upon the form of the instruments in which it will embody the results of its work, it is not considered necessary to provide in the rules of procedure for the form of the instruments which the Conference may eventually adopt.' At this point the rules of procedure adopted by The Hague Conference, as well as those proposed by the preparatory committee, were alluded to in a footnote. The Secretariat also concluded the paragraph with a suggestion that it might be wise for the instruments to be adopted by the Conference 'to contain an article stating clearly that it is the intention of the signatories that the rules contained in the instrument shall be applicable in the future without prejudice to the question whether they are or are not existing rules of customary international law'.

In the next two paragraphs of its report the Secretariat submitted the important proposal, which was embodied in rules 35 and 53 of the draft rules of procedure, that the Conference should take decisions on matters of substance by a two-thirds majority of the representatives present and voting, and on matters of procedure by a majority of the representatives present

<sup>1</sup> A/CONF.13/11.

and voting; and that the committees should take their decisions by a majority of the representatives present and voting. This proposal was endorsed by the Conference.

The Conference, when it met, did not unfortunately receive from its General Committee a very powerful direction. Indeed, when the Secretariat submitted to the General Committee a proposal that 'Each Committee must decide on the recommendation it will make to the Conference regarding the kind of instrument required to embody the results of its work, whether this should be a separate instrument or not, and what final clauses, if any, are necessary',<sup>1</sup> the General Committee adopted the proposal in a considerably amended form, which read: 'Each Committee should decide as soon as possible on any recommendations it will make to the Conference regarding the kind of instrument or instruments required to embody the results of its work, and what final clauses, if any, are necessary.'<sup>2</sup> Opinion in the General Committee was divided between those who wanted to instruct the main committees to make definite recommendations as to form, and those who preferred to allow the main committees a complete discretion in the matter. The result was a compromise, which in fact left the initiative in the hands of the individual main committees.

### *The First Committee*

In the First Committee (Territorial Sea and Contiguous Zone), questions of form received practically no attention. The reason for this was almost certainly that the questions of substance before this committee—which included the definition of the right of innocent passage, the breadth of the territorial sea and the nature of the rights enjoyed by the coastal State in the contiguous zone—were so controversial as to leave the committee with almost no time to discuss other matters, especially towards the end. On the motion of the Indian delegate, it was decided to leave to the Conference itself the consideration of the kind of instruments required to embody the results of the First Committee's work.<sup>3</sup>

### *The Second Committee*

The situation in the Second Committee (High Seas: General Régime) was very different.<sup>4</sup> The delegate of the Union of South Africa, in an eloquent speech, advanced reasons why it was the duty of every committee at least to make recommendations on the question of form, although naturally these would not bind the plenary which would have to decide in the light of all the separate recommendations put up to it by the committees. He

<sup>1</sup> A/CONF.13/Bur/L4.

<sup>2</sup> A/CONF.13/L9/Corr.1. The General Committee's recommendation was then endorsed by the plenary (A/CONF.13/38, p. 7).

<sup>3</sup> A/CONF.13/39, p. 203.

<sup>4</sup> The debate is reported in A/CONF.13/40, pp. 102-7.



went on to explain why, in his view, it would be better for the plenary to embody the results of the Second Committee's work in a 'simple declaration, adopted by a two-thirds majority', rather than in a convention. He contended that 'the articles on the régime of the high seas adopted by the Committee—unlike those relating to new concepts such as the continental shelf—nearly all had a long history behind them, and represented reasonably well-established principles of the law of nations, which could be affirmed in an instrument less cumbersome than a convention. Moreover, a declaration would probably prove more widely acceptable.'<sup>1</sup> The most important argument in favour of a declaration was that 'a formal convention would require parliamentary approval and ratification and raise the difficult problem of reservations, while a less categorical document which merely stated what the majority believed to be the applicable law would require none of those formalities and yet afford equally valuable guidance to any court dealing with a dispute'.

The South African delegate's conception of a declaration seems to have been somewhat similar to that of the preparatory committee of The Hague Conference. As we have seen, however, that Conference showed itself hostile to the recommendations of its own preparatory committee.<sup>2</sup> In view of what happened in 1930, it is indeed difficult to explain the delegate's expectation that a declaration would prove more acceptable than a convention. As for the view that a convention requires parliamentary approval and ratification, whereas a declaration does not, this seems to involve a confusion between the roles of international law and constitutional law. Whether under international law an instrument requires ratification or not depends largely on the instrument in question. It is certainly possible to conceive of a convention which does not require ratification and of a declaration which does.<sup>3</sup> Equally, it is for each State to prescribe in its constitution the circumstances under which those responsible for carrying out the foreign relations of the State have authority under the constitution to bind the State internationally.<sup>4</sup> Thus, commenting on the South African

<sup>1</sup> The statement that the articles 'nearly all had a long history behind them and represented reasonably well-established principles of the law of nations' is highly debatable, particularly with regard to Article 5 (nationality of ships), Article 11 (right to take penal or disciplinary proceedings in the event of a collision or of any other incident of navigation concerning a ship on the high seas) and Articles 24 and 25 (pollution). It is in no way the purpose of this paper to consider the substance of the articles adopted at Geneva. It may, however, be wise to warn against the tendency to assume that, just because the subject-matter of an article adopted at Geneva was not new but had a long history behind it, the article itself did nothing more than affirm established principles.

<sup>2</sup> Above, p. 14.

<sup>3</sup> On this matter generally see, as well as the authorities cited on p. 1, n. 2, above, H. Blix in this *Year Book*, 30 (1953), p. 352.

<sup>4</sup> Subject, however, to the principle that 'a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force' (The Permanent Court of International Justice in the case concerning *Treatment of Polish Nationals in Danzig*, Series A/B, No. 44, p. 24). On this question see Article 11 of Sir



delegate's contention that a declaration would not require parliamentary approval, the Swiss delegate maintained that 'No document could ever be binding on a State which had not approved it in the manner prescribed by its constitution'. The United Kingdom delegate, while in sympathy with the proposal for a declaration,<sup>1</sup> thought that many delegates might find difficulty in subscribing to a declaration without referring the matter to their Governments. Accordingly, he suggested that the proposed declaration should remain open for signature for a period of six months or a year. His meaning would appear to have been that a declaration of this kind has a certain legal effect upon signature, even if it is not made subject to ratification and consequently is not ratified. Delegates could therefore not be expected to sign a declaration with the same ease as they could a convention that was made subject to ratification. If, however, this view of the United Kingdom delegate is correct, much force goes out of the South African argument that a declaration is 'less cumbersome' and 'less categorical' than a convention.

The delegate of New Zealand stated the alternatives as follows: 'either to embody the articles in an international instrument which would be binding on States which became parties to it; or to enunciate them as a formulation, by the Conference, of the law relating to the régime of the high seas'. Since the Second Committee had been engaged mainly in codifying existing law rather than in framing new law, he had some sympathy with the suggestion that there should be a declaration rather than a convention.<sup>2</sup> Opposing this point of view, the delegate of Colombia said that his delegation had been sent to the Conference with full powers to commit his country juridically, because it had been expected that the work of the Conference would be embodied in a convention. A declaration would be 'of moral value only, imposing no obligations and having no legal force'. Even so, it would still have to be ratified by the competent constitutional bodies in his country. He saw no objection to the adoption of a convention in the fact that the work of the committee was largely a codification of the maritime law at present in force.

The Netherlands delegate said he 'had misgivings as to the legal value of a declaration which would be neither signed nor ratified and thus could not have the normal status of a treaty'. Intervening in the debate, the South African delegate confirmed—contrary to the understanding of the United Kingdom delegate—that the proposed declaration would not be signed at Hersch Lauterpacht's first report on the *Law of Treaties* (A/CN.4/63), and also Article 9 of Sir Gerald Fitzmaurice's first report on the same subject (A/CN.4/101).

<sup>1</sup> He gave as a reason in favour of a declaration that the committee had already decided that nothing should be done to prejudice existing conventions on maritime matters.

<sup>2</sup> The delegate's approach was similar to that of the British Government at the London Conference in 1908. Not surprisingly, therefore, he quoted Sir Cecil Hurst in support of his remarks.

all, but would simply be a text adopted by the Conference which, while having no legally binding force, could be used by Courts having to rule on disputes or topics covered by the work of the Conference. The delegate of Ceylon pointed out that the terms of reference given to the Conference by the General Assembly had indicated that conventions were to be the main instruments adopted by the Conference. In any case, the work of the Second Committee had not been merely declaratory of existing international law. The delegate of Czechoslovakia gave as a reason in favour of a convention the fact that many important conventions had been concluded in recent years, and therefore he could not see why the largest conference ever summoned by the United Nations should adopt a different type of instrument. He thought it necessary, however, that 'the articles adopted should be submitted to all governments for ratification. If there were no ratification by governments, they would be free to ignore the provisions of the articles at will.'<sup>1</sup> The Soviet delegate argued that 'The most common form of instrument was a convention, which had the advantage of being more specific than a declaration and of carrying a legal obligation'. In the end the committee decided to make no recommendation to the plenary.

### *The Third Committee*

The debate which took place in the Third Committee (High Seas: Fishing: Conservation of Living Resources) is also of considerable interest.<sup>2</sup> The delegate of Italy favoured a convention, which he described as 'a more appropriate instrument than a declaration, which could not include the arbitration clauses or bind States to adopt the measures necessary to put the articles into effect'. The delegate of the Philippines, who also favoured a convention, proposed that all the articles which had been adopted by the committees but had failed to obtain a two-thirds majority in the plenary should be 'incorporated in a declaration, which would be of assistance to future conferences'. The delegate of Ecuador said 'a declaration would not be a binding instrument, for it would have only moral force, and hence could not contain the articles on arbitration'. The Yugoslav delegate, however, maintained that 'history contained several examples of declarations which were no less binding than conventions', although on balance he too thought a convention would be a more appropriate instrument.

The delegates of Mexico and Cuba, on the other hand, favoured a declaration. The former stated that the committee must ensure that the fisheries articles received the widest possible measure of application and have binding force. A convention would fulfil the second condition, but

<sup>1</sup> It is difficult to understand this argument. If the delegate's main concern was that the provisions adopted at Geneva should be applied, he should surely have argued in favour of a declaration or other instrument which would become binding without the necessity for ratification at all.

<sup>2</sup> It is reported in A/CONF.13/41, pp. 116-18, 123-7.

not necessarily the first. From the practical point of view, his two requirements might be better met by a declaration. The delegate's meaning is not clear, but seems to amount to saying that because a convention would be binding on States it might not be applied by many of them; whereas States would be more likely to apply an instrument that was not binding on them. It is only necessary to add that this theory, if acted on consistently, would completely alter the whole purpose of international conferences and the techniques employed at such gatherings. The remarks of the delegate of Cuba were even more out of line with the views of the majority on the question of conventions and declarations. He considered that 'a convention would be suitable as a means of codifying existing international law', but that since the work of the Third Committee had ranged over a new field, 'a declaration, being the more flexible instrument, would better reflect international law in the process of evolution and leave it room for further development'. In the end, the committee recommended that the results of its work should be embodied in a convention.

#### *The Fourth Committee*

In the Fourth Committee (Continental Shelf)<sup>1</sup> the Colombian delegate, like his colleague in the Second Committee, maintained the proposition that the result of the work should be embodied in a convention, 'for only in that way would it be possible to give legal force to the decisions reached; a mere declaration would not be binding'. The delegate of Canada maintained that, if the committee had merely been codifying existing law, a convention would not have been necessary; but that, 'as the continental shelf was a new area of international law, only a convention was capable of investing its decisions with the necessary authority'. It is not reported, however, what form of instrument the delegate would have considered appropriate if the committee had been engaged in codifying existing law.

The delegate of the United Kingdom considered the articles adopted concerning the continental shelf to be novel provisions, which should therefore be regarded as contributing to the progressive development, rather than the codification, of international law. As such they should be embodied in a convention. She also said that 'Declarations were usually intended to state existing rules and did not require ratification, though there were exceptions, such as the Paris Declaration of 16 April 1856, concerning maritime law in time of war'.<sup>2</sup> In her view, 'although a declara-

<sup>1</sup> The debate is reported in A/CONF.13/42, pp. 108-111.

<sup>2</sup> This abridged report is misleading. Presumably what the delegate had in mind was that the Declaration of Paris did not confine itself to stating existing rules. Indeed, the rule abolishing privateering was undoubtedly a new rule, although drafted in the form 'La course est et demeure abolie', and was the reason why the United States declined to accept the Declaration. The Declaration of Paris was not (unlike the Declaration of London, 1909) made subject to ratification, but



tion might be more widely acceptable, it would also be less binding'. The Swiss delegate, however, maintained that the words 'convention' and 'declaration' had no specific meaning, and that the Declaration of Paris had greater authority than many conventions which had been ratified, but not applied. Whereas the United Kingdom delegate thought that an article providing that disputes should be referred to the International Court of Justice would not be appropriate in a declaration, the Swiss delegate could see no reason why such an article should be thought unsuitable for inclusion in that form of instrument. The Soviet delegate argued that a declaration would not be binding on States and that, since it would not require ratification, it could be used against the legitimate interests of some countries.<sup>1</sup> Accordingly, he pressed for the adoption of a convention. Finally, the Committee decided to recommend that its work should be embodied in a convention relating to the continental shelf.

### *The plenary meetings*

Although only summary, and not verbatim, records are available,<sup>2</sup> the paraphrases which have just been given of the debates in the First, Second, Third and Fourth committees show beyond doubt an unhealthy state of confusion in the minds of many delegates on questions of form. To some extent the same confusion was evident in the plenary itself, when it had to consider the reports of these four committees and to decide finally what form should be given to the work of the Conference. As, however, the same ground was gone over again, it will not be necessary to refer to the debates in the plenary, except that which took place at the eleventh meeting on the report of the Second Committee.<sup>3</sup> The delegate of the Union of South Africa, pleading once again that the results of the work of that committee should be expressed in the form of a declaration, suggested that the proposed declaration should begin as follows:

'The United Nations Conference on the Law of the Sea declares by a majority in no case of less than two-thirds of the members present and voting that the following are, as of the date of the adoption of this declaration, principles of international law relating to the high seas.'

As, however, was pointed out by the delegate of Roumania, the inclusion of the words 'as of the date of the adoption of this declaration' demolished the entire case for a declaration, since those words were just as consistent

it contained a provision to the effect that, while the signatory Governments would press for its wider adoption, 'la présente déclaration n'est et ne sera obligatoire qu'entre les Puissances qui y ont ou qui auront accédé'.

<sup>1</sup> The delegate's meaning is obscure. It is difficult to see how a non-binding declaration could be 'used against the legitimate interests of some countries'.

<sup>2</sup> Summary records can sometimes be misleading in that they involve an undue condensing or telescoping of ideas. See, for instance, p. 22, n. 2, above.

<sup>3</sup> A/CONF.13/38, pp. 24-28.



with a progressive development of the law as with a codification of it. He did not, however, draw the logical conclusion from his own argument, which was that a declaration containing such preambular words was no different from a convention, but proceeded to insist that the Conference should adopt a convention and not a declaration.

The South African delegate also explained that his proposed declaration in itself would not be opened for signature and would not be binding, but that it would be supplemented by a protocol, which would be open for signature and ratification and under the terms of which the declaration would be accepted as binding. Following up this proposal, the delegate of the Philippines suggested that the Conference might adopt a declaration, together with a protocol, for articles which obtained a two-thirds majority, and a declaration without a protocol for articles (e.g. on the breadth of the territorial sea) for which there was only a simple majority.

The delegates of Venezuela and Afghanistan expressed a view which, though apparently unorthodox, is certainly held sufficiently widely to be taken seriously.<sup>1</sup> This was that, since the Conference's task was codification of the law, a convention would be more suitable than a declaration. The Soviet delegate adhered to the view, often expressed by representatives of that country, that a declaration 'would merely be a resolution without binding force'. As such, it would be a convenient guide for national law, but would not have much authority in international law. A convention, on the other hand, would not merely fulfil this function of being a guide, but would also make clear the position of each State by means of the procedure of signature, accession and ratification. He even expressed the view that 'a convention would produce effects even outside the group of States parties, for it would come to be regarded as a source of international law'.

### *The Fifth Committee*

We now come to the debate in the Fifth Committee which was of an entirely different nature. This was because the other four committees had before them, at the outset, as bases of discussion, relevant portions of the

<sup>1</sup> The same view was put forward by the delegate of Cuba. See p. 22, above. The explanation may lie in different understandings of the meaning of the word 'codification'. We have seen how that word is defined in Article 15 of the Statute of the International Law Commission. This definition corresponds to what Sir Cecil Hurst has called 'codification of international law in the strict and proper sense and as the term has generally been understood by British writers'. In the same article, however, Sir Cecil refers to an idea of codification which is 'looser and more prevalent on the Continent of Europe'. This idea 'incorporates the idea of amending the law as well as defining it, so that the provisions in the code shall state the rules of international law as they ought to be, regardless of whether they are so'. Referring to this kind of 'codification', which corresponds more closely to 'progressive development' in the Commission's Statute, Sir Cecil says, 'Now that method can only be achieved by convention, because the moment that the question is left on one side as to whether or not the rule is or is not the existing rule of international law, it will only become binding on States which are satisfied with it through their acceptance of the convention in which it is laid down' (*Transactions of the Grotius Society*, vol. 32, p. 146).

articles on the law of the sea adopted by the International Law Commission at its eighth session. Although these can hardly be described as a draft convention—they lacked, for instance, final clauses and some of them were drafted in an inconclusive manner—they were nevertheless, on the whole, drafted in a form suitable for relatively easy adaptation into a convention. Also, although the delegate of Ceylon was probably going too far when he insisted that the General Assembly's instructions positively required the Conference to produce a convention or conventions unless good reasons could be shown to the contrary, there was certainly a strong assumption from the earliest stages of preparation that the Conference would, if it were in any way successful, adopt one or more conventions. This assumption may have rested on nothing more than the recommendation of the International Law Commission that it would be necessary to have recourse to 'conventional means', and also on the fact that a convention has now become the standard form of instrument to be adopted by Conferences sponsored by the United Nations.<sup>1</sup> But, whatever its basis, it was powerful enough to cause the South African proposal for a declaration to make very little headway. Consequently, the only serious decision on a question of form which the Conference had to take in connexion with the work of the first four committees was whether to have one convention or four separate conventions. It decided in favour of four.

The Fifth Committee (Question of Free Access to the Sea of Land-locked Countries) had, however, virtually no preparatory work before it,<sup>2</sup> and the question was even raised, and seriously discussed, whether the committee was entitled to recommend the Conference to adopt a convention or any other form of binding instrument on the subject before it.<sup>3</sup> In these circumstances questions of form assumed unusual prominence,

<sup>1</sup> For example, reference to the *Year Book of the United Nations* for the year 1956 shows conventions on the following diverse subjects as having been 'drawn up under the auspices of the United Nations': Customs Convention on the Temporary Importation for Private Use of Aircraft and Pleasure Boats; Convention on the Taxation of Road Vehicles for Private Use in International Traffic; Customs Convention on Containers; Customs Convention on the Temporary Importation of Commercial Road Vehicles; Convention on the Contract for the International Carriage of Goods by Road; Convention on the Recovery Abroad of Maintenance Obligations; Convention regarding the Measurement and Registration of Vessels Employed in Inland Navigation; Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery; Convention on the Taxation of Road Vehicles Engaged in International Passenger Transport; and Convention on the Taxation of Road Vehicles Engaged in International Goods Transport. It is significant that, apart from a few protocols of signature used in connexion with the above conventions, no other form of instrument is shown as having been adopted by conferences held 'under the auspices of the United Nations' during the year in question.

<sup>2</sup> Apart from a memorandum prepared by the Secretariat (A/CONF.13/29 and Add.1); a memorandum of an *ex parte* nature submitted by a preliminary conference of some of the land-locked countries themselves (A/CONF.13/C5/L1); and one or two other documents mentioned in the Report of the Fifth Committee (A/CONF.13/L11).

<sup>3</sup> The debates in the Fifth Committee are reported in A/CONF.13/43.

not merely at the end of the deliberations—as tended to be the case with the other committees—but even at the beginning.

The majority of the committee showed itself to be in favour of the view that, even though the General Assembly had only requested the Conference 'to study the question of free access to the sea of land-locked countries as established by international practice or treaties', and had not specifically requested it, in regard to this subject, as it had on the law of the sea as a whole, 'to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate', the committee was competent, if it thought fit, to recommend the Conference to adopt a definite legal instrument, and not merely to record the results of its studies in a report. But the question remained, what kind of instrument?

In the general debate, the delegate of Afghanistan considered that the Conference should endeavour to codify all the recognized principles relating to the rights of land-locked States. Yet he also wanted the Conference 'to confer a more precise status on the land-locked States and to prepare an instrument which could do more to ensure the development of international law than the Barcelona Conference had been able to do'. He later made it clear that a convention was the most suitable instrument for achieving this double task of codification of existing law as well as progressive development of the law. The delegate of Nepal called for the inclusion of articles concerning the access of land-locked countries to the sea in a general convention of the régime of the high seas, since that would ensure the acceptance and ratification of the articles by the greatest possible number of States: failing that, the principles could be embodied in a separate declaration opened for signature and ratification in the same way as any other instruments that the Conference might adopt. He seemed to envisage articles based on certain principles 'which were already written into international practice and which the Conference might codify'. The delegate of the United Kingdom warned that to put the right of land-locked countries to sail ships on the high seas under their own flag in a convention might even weaken that right. For conventions were usually subject to denunciation and, if a convention affirming this right of land-locked countries were denounced, the right itself might be called in question. It was for that reason that the Barcelona Conference of 1921 had accepted the British suggestion that the right should be asserted in a declaration rather than a convention.<sup>1</sup> The Netherlands delegate was opposed to a convention, but favoured a declaration stating a few general principles which would assist land-locked States in negotiating agreements with their neighbours. The Yugoslav delegate thought the best course

<sup>1</sup> The Barcelona Declaration of 1921 was signed, but not ratified. It contained no denunciation clause (*United Kingdom Treaty Series*, No. 29 (1923)).



would be for the Conference to proclaim certain principles in a resolution.

At the end of the general debate, two proposals were submitted, one by nineteen Powers<sup>1</sup> and the other by three Powers.<sup>2</sup> The nineteen-Power proposal consisted of nine articles, but was silent on the question of the form to be given to the articles. The three-Power proposal recommended the insertion of a new article 'in the main Convention on the Law of the Sea'; the addition of a sentence to one of the articles being considered by the Second Committee; and also the adoption of a resolution. It was decided to discuss the two proposals together point by point. It soon became clear, however, that neither proposal was likely to obtain a clear majority, and the nineteen-Power proposal in particular was criticized for its obscurity on the vital question of form. In an effort to bring the two sides closer together, it was suggested that a working party be set up, but again disagreement broke out on the question whether the working party should consider substance only, or form only, or both form and substance. It was eventually decided that the working party, consisting of twelve States, should report to the committee 'its recommendations concerning the form or forms in which the results of the Committee's work should be expressed'.

It was, of course, impossible for the working party to consider questions of form purely in the abstract, so it decided to consider them in relation to each individual item in both the nineteen-Power proposal and the three-Power proposal, as well as amendments submitted to both these proposals. The working party recommended that the results of the committee's work should be expressed partly in a convention, partly in a declaration and partly in a resolution.<sup>3</sup> It did not explain the reasons for these recommendations, which in any case were not unanimous. Some members explained that, where the working party had decided on a convention, they would have preferred a resolution. Others stated that, where the working party had decided on a resolution, they would have preferred a declaration.

Although the working party did not give the reasons for these recommendations, it is quite easy to deduce from its report what were the considerations underlying the attitude of its various members. Those members who wanted a maximum assertion of the rights of land-locked countries pressed for a convention. Those members who wanted a minimum assertion of the rights of land-locked countries pressed, on the whole, for a resolution. A declaration was regarded by each side as the most desirable

<sup>1</sup> A/CONF.13/C5/L6.

<sup>2</sup> A/CONF.13/C5/L7.

<sup>3</sup> For the report of the working party, see A/CONF.13/C5/L16. This recommendation did not mean that the working party was in favour of three separate instruments but merely that, of the various proposals then before the committee, it thought that some (if adopted) should go into a convention and the others (also if adopted) into a declaration or a resolution.

alternative if its first wish was unobtainable, and also commended itself to those members who were inclined towards a compromise in any case. In other words, a convention was regarded as stronger than a declaration, and a declaration as stronger than a resolution. These pragmatic considerations would appear to have counted for far more than academic criteria, such as whether the proposal in question amounted to 'progressive development' or 'codification'. The useful piece of unravelling achieved by the working party proved in any case to be abortive because the three-Power proposal was withdrawn and a compromise Swiss proposal was introduced, given priority over the nineteen-Power proposal and finally adopted after being amended. Elements of the Swiss proposal were later added to the drafts recommended by the First and Second committees.

### *Conclusion of the Conference*

The Conference held a special meeting on 29 April 1958 for the signature of its Final Act.<sup>1</sup> This recorded the circumstances in which the Conference had come into being; listed the countries present as well as the specialized agencies and inter-governmental organizations represented by observers; described the organization of the Conference; and finally enumerated the instruments adopted. These consisted of the four conventions already mentioned; an optional protocol of signature concerning the compulsory settlement of disputes; and nine resolutions. Of these it is only necessary to mention the protocol concerning the settlement of disputes. Since the four conventions themselves contained no general arrangements for the settlement of disputes, it was decided to open for signature an optional protocol under which the parties to the protocol agreed to accept the compulsory jurisdiction of the International Court of Justice for disputes arising out of the interpretation or application of any of the four conventions.<sup>2</sup> The optional protocol was 'subject to ratification, where necessary, according to the constitutional requirements of the signatory States'. The four conventions themselves were open until 31 October 1958 for separate signature 'by all States Members of the United Nations or any of the Specialized Agencies, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention'. They were also open for accession by any States belonging to these categories; were made subject to ratification; and were not to enter into force until the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

<sup>1</sup> A/CONF.13/L58 or A/CONF.13/38, p. 146.

<sup>2</sup> The protocol, however, was not to apply to disputes on certain matters relating to conservation of natural resources for which special arrangements were made in the Convention on Fishing and Conservation of the Living Resources of the High Seas.

Finally, it should be noted that the preambles of the four conventions showed marked differences. The preamble of the Convention on the Territorial Sea and the Contiguous Zone simply said that 'The States Parties to this Convention have agreed as follows'. The preamble of the Convention on the Continental Shelf was in similar form. This form gives no guidance at all on the question whether the convention is to be regarded as stating existing law or framing new law. By contrast, the preamble of the Convention on Fishing and Conservation of the Living Resources of the High Seas gave a clear indication that it was intended to frame new rules, whilst the preamble of the Convention on the High Seas was ambiguous. It provided that

'The States Parties to this Convention,  
Desiring to codify the rules of international law relating to the high seas,  
Recognizing that the United Nations Conference on the Law of the Sea, held at  
Geneva from 24 February to 27 April 1958, adopted the following provisions  
as generally declaratory of established principles of international law,  
Have agreed as follows.'

This reference to codification, coupled with the mention of provisions 'generally declaratory of established principles of international law', was as far as the Conference was willing to go to meet South Africa's request for a declaration. The formulation is clearly deficient in that it leaves open the question which provisions are to be regarded as declaratory and which are to be regarded as new. Nevertheless, it seems to indicate that the general intent of the draftsmen was to codify existing law and, as such, it may be a useful aid to the interpretation of the convention.

### *Summary of Conclusions*

It was explained at the beginning that the purpose of this article was to be exploratory rather than definitive. It is hoped that the task of exploration has now been achieved in the sense that certain problems, with which the standard treatises on international law scarcely deal, have been unearthed from the records of major international conferences. These records indicate at the very least a serious degree of confusion in the minds of delegates as to the precise legal nature of the forms available for expressing the conclusions of such conferences.

It is not possible within the bounds of this article to solve these problems. It is hoped, however, that the mere revelation of the confusion which exists may contribute towards a solution.

From a practical point of view, it seems that the following forms are open to international conferences for the expression of their conclusions: Final Act, protocol, convention, declaration and resolution (including under this



head 'recommendation' and *voeu*). Other forms no doubt exist, but may for the time being be ignored.

The first question which has to be decided is whether the delegates intend to enter into a 'treaty' or not. As we saw in the introduction, this question resolves itself into another question, which is of apparent simplicity but actually of great complexity; namely, do they or do they not intend to establish between themselves legal rights and obligations? It would, therefore, contribute towards a solution if we could be sure that certain forms are used when it is intended to enter into legal relations and other forms are used when it is not so intended.

The next step towards a clarification of the problem is, however, to realize that it is not capable of any such straightforward solution. It was pointed out in the introduction that the parties to an international instrument, while employing a form usually associated with entry into legal obligations, may on a particular occasion make of that form an empty shell, devoid of all real obligations. Conversely, they may employ a form not usually associated with entry into legal obligations, and on that particular occasion give that form the distinct character of a treaty. Let us take a practical example. A convention is a form usually associated with entry into legal obligations, whereas a resolution is not.<sup>1</sup> If, however, in a particular article or paragraph of an instrument precisely the same language were used, would it make any difference whether the instrument itself was designated either as a convention or as a resolution? For instance, in Article 20 (1) of the Convention on the Territorial Sea and the Contiguous Zone, 1958, it is provided that 'The coastal State should not stop or divert a foreign ship passing through the territorial sea for the purpose of exercising civil jurisdiction in relation to a person on board the ship'. Whenever a weak word, such as 'should', is used, it may be difficult to determine whether it was intended to state a precise legal obligation or not. But would it in this case make any difference if, instead of drafting article 20 (1) in this form, the parties had adopted a resolution stating that 'The United Nations Conference on the Law of the Sea resolves (recommends) that the coastal State should not stop or divert a foreign ship passing through the territorial sea . . . '?

It is not easy to answer this question. On the one hand, it seems difficult to interpret the same words in a different sense merely because the instru-

<sup>1</sup> Sir Gerald Fitzmaurice has referred to the 'fundamentally recommendatory character' of resolutions of the General Assembly in this *Year Book*, 34 (1958), p. 3. See also Sloan, *ibid.* 25 (1948), p. 1, and the present writer, *ibid.* 32 (1955-6), p. 97. The articles just referred to are all concerned with the legal status of resolutions of the General Assembly. They are, however, no less relevant to the resolutions of international conferences in general. A good example of a resolution of an international body being held to be binding is the resolution of the Council of the League of Nations of 10 December 1927, which was held by the Permanent Court of International Justice to be binding on Lithuania and Poland (Series A/B, No. 42, p. 116).

ment in which they were contained was designated under another name. On the other hand, the intention of the parties in selecting one form of instrument rather than another can scarcely be ignored. The only way out of the difficulty, it is suggested, is by way of presumptions. There is a general understanding, as we saw, that a convention is a stronger instrument than a resolution. By the 'strength' of an instrument we mean simply the degree of association which exists between that form of instrument and entry into legal obligations. All we can say, therefore, is that, if precisely the same words were used, they would be more likely to create a legal obligation if inserted in a convention than if included in a resolution.

Even this, however, does not solve all the difficulties that may arise as between conventions and resolutions. We have referred in general terms to a convention being 'stronger' than a resolution. Few would dispute this conclusion in respect of a convention signed and ratified by the parties concerned. But can the same be said of a convention signed by the parties concerned, but not ratified by them? What is the legal effect, for instance, on a State of a convention which it has not signed, as compared with a resolution on which it has abstained? All sorts of alternative possibilities could be mentioned, but sufficient has already been said to indicate that the choice between a convention and a resolution will often not be an easy one, either for a conference collectively or for delegates individually.

With regard to declarations, as we have seen, the problem is even more complicated, unless the very complexity of the problem has contributed towards a solution by causing this particular form to lose favour altogether. It is not necessary to recapitulate all the various meanings given to the term 'declaration' in the last fifty years in order to point out that it has now become dangerous to use this term at all. It is believed that the correct use of the term is to describe an instrument in which the parties have endeavoured to codify existing law, though such instruments are likely to be rare. But it may be desirable that the question of treaty forms, already complicated enough, should not be further complicated by controversy over the precise meaning of 'codification' as compared with 'progressive development'. It might therefore contribute towards a solution if the term 'declaration' were dropped altogether; if the convention became the standard instrument for the expression of the conclusions of international conferences when it is intended to state those conclusions in the form of legal obligations; if, by contrast, the resolution became the standard instrument for the expression of conclusions not intended to be stated in the form of legal obligations; and if, finally, the difficult question of 'codification' as opposed to 'progressive development' could be solved by the adoption of suitably adjusted preambles within the general framework of conventions. This solution may be drastic, but it has the merit of simplicity. In any case,

it is submitted that the adoption of some internationally agreed code of practice with regard to conventions, declarations and resolutions is urgently needed.

It remains only to consider the terms 'Final Act' and 'protocol' which, although not devoid of problems, seem today to give rise to fewer difficulties. Under modern practice, signature of a Final Act does not usually entail acceptance of legal obligations. In fact, the Final Act of a modern conference (e.g. that of the Geneva Conference of 1958) is normally prepared as a report, by the Secretariat, in such a way that all the participants will be able to sign it, no matter how violent their disagreements at the conference table. The position is now completely the reverse of what it was, for instance, at the Congress of Vienna. There, according to Sir Charles Webster, the procedure was that more than a dozen treaties and declarations dealing with specific problems were appended to the Final Act<sup>1</sup> in such a way that 'each Power, in order to obtain from the Vienna Treaty the protection and guarantee of its own special interests, had also to agree to the rest, however much it might object to any particular portion of it'.<sup>2</sup> The Final Acts of the Conferences of Berlin (1885)<sup>3</sup> and Brussels (1890)<sup>4</sup> no less amounted to treaties in themselves. A change, however, took place at The Hague Peace Conferences of 1899 and 1907, where it was decided to mention in the Final Acts<sup>5</sup> certain instruments that had not been adopted unanimously. This was done originally with the consent of the States voting against the instruments in question. But, once it became the practice, as it now has, for most international conferences to take decisions by a majority (either a two-thirds or even a simple majority), there was no longer any reason to request the permission of the minority for mention to be made in the Final Act of decisions to which they had objected. Since, however, the minority were still not bound by these decisions, the Final Act ceased to be a treaty in itself and was reduced to the level of a mere report or *communiqué*.<sup>6</sup>

The term 'protocol' has a great many uses,<sup>7</sup> but fortunately it is generally not difficult to distinguish between them. The term is sometimes—though less so than formerly—used as an equivalent to a Final Act (e.g. the *Protocole de Clôture* or Final Protocol of the London Naval Conference, 1908–9).

It is also used as part of the machinery of bringing an agreement into existence (e.g. the Protocol of Signature by Members of the League of Nations establishing the Permanent Court of International Justice and

<sup>1</sup> *British and Foreign State Papers* (referred to subsequently as *B.F.S.P.*), vol. 2, p. 3.

<sup>2</sup> *The Congress of Vienna, 1814–1815* (1934), p. 82.

<sup>3</sup> *B.F.S.P.*, vol. 76, p. 4.

<sup>4</sup> *Ibid.*, vol. 82, p. 55.

<sup>5</sup> *Ibid.*, vol. 91, p. 963, and vol. 100, p. 281.

<sup>6</sup> On this question see Fauchille, *op. cit.*, vol. 1, part 3, pp. 245–8.

<sup>7</sup> See Satow, *A Guide to Diplomatic Practice* (4th ed., by Sir Neville Bland, 1957), p. 338.



declaring Acceptance of the Statute of the Permanent Court, of 16 December 1920).<sup>1</sup> It is, however, most frequently used, especially in modern times, of an agreement that is subsidiary or supplemental to a main agreement. Thus, the term 'optional protocol' was correctly employed by the Geneva Conference, 1958, to describe the additional agreement which States could enter into if they were willing to have disputes arising out of the interpretation or application of the four main conventions adjudicated by the International Court of Justice. The term 'protocol' was also apt to describe the agreements reached by The Hague Codification Conference, 1930, with respect to Military Obligations in Certain Cases of Double Nationality and to a Certain Case of Statelessness, since these agreements were subsidiary to a general Convention on Certain Questions relating to the Conflict of Nationality Laws. In the circumstances the Conference cannot be criticized for adopting a 'Special Protocol Concerning Statelessness', since this agreement was only adopted by a simple majority in the First Committee, and not unanimously (as was the convention) or by a two-thirds majority (as were the two protocols). Such an agreement was required by the rules of procedure to be embodied in a 'special protocol'. It is believed, however, that this was rather a special case, due to the fact that, when The Hague Codification Conference met in 1930, the principle of arriving at decisions in such law-making conferences by majority vote was only on the point of gaining acceptance. Similar problems are not likely to arise in the case of conferences sponsored by the United Nations. It may, however, be pointed out that if it became a general practice to embody the conclusions of international conferences in different forms of instrument according to the majorities obtained, either at the committee stage or in the plenary, an already complicated subject would become still more involved.

<sup>1</sup> *B.F.S.P.*, vol. 114, p. 860.

# THE PROPER LAW OF CONTRACTS CONCLUDED BY INTERNATIONAL PERSONS<sup>1</sup>

By F. A. MANN

SOME fifteen years ago it was submitted<sup>2</sup> that there are, on the one hand, contracts between international persons, which are subject to a national law, and, on the other hand, contracts between international and private persons, which are subject to public international law, and that in both cases the governing legal system is determined by the express or implied intention of the parties.

The developments, both factual and legal, which have taken place since then and which have a bearing upon that thesis have been substantial. This is due mainly to the large number of international persons other than States, which have come into existence since 1944 and which enter into contracts of varying types. There have also appeared some doctrinal contributions which, whether they were critical or approving in character, have thrown fresh light upon certain aspects of that thesis, its justification, correctness and effect. Hence, although legal writers should normally consider themselves subject to the rule *ne bis in idem* and nothing is intended to derogate from its strictness, weighty extenuating circumstances may be pleaded if it is now proposed once more to review a problem of growing practical importance. The purpose will be, not to repeat, but to reconsider in the light of experience what was said earlier on contracts between international persons (below, section I) and between international and private persons (below, section II) and, finally, to define the problems in the light of some broader aspects of legal development (below, section III).

## I

1. Contracts between international persons, particularly States, are, in general, subject to public international law.

This principle which is not open to doubt implies, of course, the existence of a body of public international law capable of being applied to contractual arrangements between international persons. No international lawyer will experience any difficulty on this score. While he is conscious of the rudi-

<sup>1</sup> © F. A. Mann, 1960.

<sup>2</sup> 'The Law Governing State Contracts', in this *Year Book*, 21 (1944), pp. 11 et seq. The present article is supplementary to the earlier one. It is a development of a recent paper by the present writer in *Jus et Lex, Festschrift für Max Gutzwiller* (Basel, 1959), p. 465, which appeared in German under the title 'Die Verträge der Völkerrechtssubjekte und die Parteiautonomie'.

mentary character of international law in many respects, he will fill gaps by invoking the general principles of law recognized by civilized nations, as directed by Article 38 of the Statute of the International Court of Justice. In order to find these principles he will resort to private law on a comparative basis. It is at this point that the methodological problem raises its head: how is the process of comparison to be operated so as to lead to the ascertainment of general principles?

This question arises with particular urgency in connexion with those treaties which come under the heading of the commercial law of nations and, accordingly, display the greatest degree of similarity with contracts subject to private law or concluded by private persons.<sup>1</sup> For international persons have everywhere gone into business. They have, on the footing of both public international and municipal law, formed corporate bodies in order to engage in banking,<sup>2</sup> render rivers navigable<sup>3</sup> or finance the supply of railway material.<sup>4</sup> Furthermore, on the footing of public international law, they enter into transactions of a commercial character. A complete investigation of international practice is not yet available. A survey of British practice<sup>5</sup> has produced significant examples of contracts for the sale or exchange of goods, contracts for work and labour, leases, loans and contracts for the exchange of patents and technical information. Fresh examples continue to come to light. Thus a recent treaty between the United Kingdom and Turkey<sup>6</sup> concerns the purchase of certain ships of the British Reserve Fleet by the Turkish Government. The treaty is said to be 'constituting an agreement between the two Governments in this matter', yet it also records the fact that 'agreement was reached in principle'

<sup>1</sup> See, generally, 'Reflections on a Commercial Law of Nations', in this *Year Book*, 33 (1957), pp. 20 et seq.

<sup>2</sup> E.g., the Bank for International Settlements, a legal person created by Swiss law, and the International Bank for Reconstruction and Development, a legal person created by public international law.

<sup>3</sup> For a recent example see the treaty between France, the Federal Republic of Germany and Luxembourg relating to navigation on the Moselle of 27 October 1956 (BGBl 1956 II 1838), which provides for the formation of the Internationale Mosel-Gesellschaft m.b.H., a limited company created under German law.

<sup>4</sup> See the treaty between Yugoslavia and Albania of 28 November 1946 relating to the formation of an Albanian company intended to build and operate railways, *United Nations Treaty Series*, vol. 111, p. 127. (For other treaties between these two States see *ibid.* pp. 95 and 115.) And see the treaty of 20 October 1955 (BGBl 1956 II 907), which was concluded between thirteen European States and provides for the formation of Eurofima, a limited company created under Swiss law for financing the purchase of railway equipment.

<sup>5</sup> In addition to the treaties discussed on pp. 23 et seq. of the article referred to in n. 1, above, see treaty of 27 November 1875 relating to the purchase of shares in Suez Canal Company, printed by Hurewitz, *Diplomacy in the Near and Middle East* (1956), vol. 1, p. 179; Loan Agreement between Great Britain and Persia of 6 August 1919, Cmd. 300 or Hurewitz, *op. cit.*, vol. 2, p. 64; Agreement of 18 July 1951 between the United Kingdom and the United States of America relative to the development of the Rhodesia Railways, *United Nations Treaty Series*, vol. 117, p. 49; Agreement of 28 November 1951 between New Zealand and the United Kingdom concerning sugar supplies, *ibid.*, vol. 127, p. 263.

<sup>6</sup> Cmd. 260.



only. A treaty between the United Kingdom and the Republic of the Lebanon<sup>1</sup> sets forth the terms on which a free loan of arms, ammunition and equipment was made in November 1956 to the latter State, and again exemplifies the numerous legal problems which are likely to arise. What is the scope of the obligation of the borrower State to make good the cost of repairing damage to equipment 'except for fair wear and tear'? What is the precise extent of the borrower State's obligation to *replace* equipment which has been lost, seeing that the treaty provides for the setting up of an Anglo-Lebanese Commission to study the question of *compensation* for such losses? Treaties of a commercial character are, however, by no means a peculiarity of British State practice. The volumes of the *United Nations Treaty Series*, of which about three hundred have so far appeared, as well as the new series of the *United States Treaties and Other International Agreements*, contain numerous examples of such treaties to which Great Britain was not a party and which require compilation and scholarly analysis.<sup>2</sup>

That there are and, indeed, must be legal rules applicable to commercial treaties of this type will be obvious and is, in fact, proved by daily experience, though the number of cases capable of serving as precedents is as yet small and the number of unsolved problems of both substance and method is large. One of the few modern decisions, the significant, though in many respects highly unsatisfactory case of the *Diverted Cargoes*<sup>3</sup> was, within a short time, followed by another case relating to the international law of money, viz. *Switzerland v. Federal Republic of Germany* decided by the Arbitral Tribunal for the Agreement on German External Debts.<sup>4</sup>

<sup>1</sup> Cmnd. 518.

<sup>2</sup> See, for example, Convention of 2 March 1936 between the United States of America and Panama relating to the construction of the Trans-Isthmian Highway, *League of Nations Treaty Series*, vol. 100, p. 205 with Supplemental Agreement of 31 August and 6 September 1940, *United Nations Treaty Series*, vol. 124, p. 210; Agreement between the United States of America and Panama of 23 March 1940 relating to the construction of a highway between Chorrera and Rio Hato, *ibid.*, p. 196; Agreement of 17 May, 1946 between the United States of America and Portugal relating to the supplying of Portuguese colonial sisal, *ibid.*, vol. 126, p. 3; Agreement of 2 July 1947 between New Zealand and France regarding the granting of credits for the purpose of financing purchases of wool and other produce of New Zealand, *ibid.*, vol. 16, p. 219; Agreement of 11 September 1946 between the United States of America and the Philippines for the sale of certain surplus war property, *ibid.*, vol. 43, p. 231; Convention of 23 December 1946 between Yugoslavia and Roumania concerning the loan of grain, *ibid.*, vol. 116, p. 33; Loan Convention between Belgium and Netherlands of 7 September 1949 between Belgium and the Netherlands (with form of promissory note), *ibid.*, vol. 117, p. 3; Loan Agreement of 7 September 1949 between Belgium and France (with form of promissory note), *ibid.*, vol. 123, p. 13; Loan Agreement of 23 March 1948 between United Nations and the United States of America, *ibid.*, vol. 19, p. 43.

<sup>3</sup> *Revue Critique de Droit International Privé* (1956), p. 278; *Int. L.R.* (1955), p. 820 discussed by Simpson, *International and Comparative Law Quarterly*, 5 (1956), p. 427; Simpson and Fox *International Arbitrations* (1959), p. 135; Dach, *American Journal of Comparative Law*, 5 (1956), p. 512; Mann, in this *Year Book*, 33 (1957), pp. 41 et seq.; *Recueil des Cours*, 96 (1959).

<sup>4</sup> Reports No. 1 and (in a German extract) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 19 (1958), p. 761, discussed by Johnson, in this *Year Book*, 34 (1958), p. 363 and W. Lewald, *Neue Juristische Wochenschrift* (1959), 1017.

In respect of certain debts contracted by German debtors the Agreement on German External Debts signed in London on 27 February 1953<sup>1</sup> provides<sup>2</sup> that such debts 'expressed in Gold Marks or in Reichsmarks with a gold clause as have a specific foreign character shall be converted into Deutsche Mark at the rate of 1 Goldmark, or 1 Reichsmark with a gold clause = 1 Deutsche Mark'. Debts have a 'specific foreign character' if<sup>3</sup> it was 'expressly agreed under the original written debt arrangements that the place of payment . . . is situated abroad'. A contract made in 1931 between a Swiss vendor and a German purchaser provided that payment of the purchase price was to be made 'free of charge to the vendor'. The question, accordingly, arose whether these words constituted an express agreement that the place of payment was in Switzerland. The Arbitral Tribunal held by a majority (Messrs. Daehli, Michelson, Richard, Phenix and Hinderling, Messrs. Barandon, Wolff, von Caemmerer and Makarov dissenting) that the words 'place of payment' had their natural as opposed to their technical meaning, and signified the place where the creditor is entitled actually to receive payment, not the place at which the money is to be dispatched to the creditor or any other step preparatory to actual payment is to be taken. Although the result, derived from a comparative approach, may be said to be based on a construction of the London Agreement, it would seem to be permissible to deduce from the decision the rule that in public international law the place of payment is the place where payment is actually to be made to the creditor. For the majority assigned to the expression an independent meaning, a meaning determined by public international law. The minority took the view that the concept had to be taken from the law applicable to the contractual relationship between the parties, in the present case from German law according to which the place of payment was in Germany. It is not necessary for present purposes to take a position on these or other controversial aspects of the decision,<sup>4</sup> for it is sufficient to note the emergence of a satisfactory and acceptable rule of the commercial law of nations, according to which in public international law the place of payment is *prima facie* in the creditor State.<sup>5</sup> Nor does the pursuance of such questions fall within the scope of the argument which it is intended to submit. This merely requires proof of the existence of a branch of public international law which deals with and is capable of

<sup>1</sup> Cmd. 8781.

<sup>2</sup> Annex II, Article V (3).

<sup>3</sup> Annex VII, section I, paragraph 2 (a).

<sup>4</sup> The decision of the majority is open to criticism on the ground, among others, that probably there was no express agreement in regard to the place of payment and that, consequently, the discussion of the meaning of that term was otiose.

<sup>5</sup> It should be made clear that the decision is not conclusive on this point. In the first place, as mentioned above, it may be said to rest on construction of the treaty. Secondly, the treaty does not embody a commercial transaction between international persons, but has a law-making character. Yet it supports the rule mentioned in the text.

regulating treaties of an economic character. That that branch is in an early stage of development must be regarded as a challenge to scholars rather than a negation of its existence.

2. Although international persons usually contract on the footing of public international law, there does not exist any legal rule which precludes them from submitting their transactions to a system of municipal law selected by them.

Until recently it was not easy to indicate treaties of an economic character by the terms of which the parties have in fact provided for the application of a system of municipal law. There is now available, however, the example provided by a number of loan agreements which the International Bank for Reconstruction and Development, an international person, in the early years of its existence concluded with several States and which invariably contained the clause<sup>1</sup>

'The provisions of this Agreement and of the Bonds shall be interpreted in accordance with the law of the State of New York, United States, as at the time in effect.'<sup>2</sup>

This is an express choice-of-law clause which makes the whole of the law of New York applicable to the Agreement. A different view has been suggested by three authors who belong to the Legal Department of the Bank.<sup>3</sup> Their observations, although not entirely clear, are apparently intended to mean that the clause contemplates merely the incorporation of New York rules of interpretation, but does not exclude the application of public international law to which reference is allegedly made by another clause reading as follows:<sup>4</sup>

'The rights and obligations of the Bank and the Borrower under the Loan Agreement and the Bonds shall be valid and enforceable in accordance with their terms notwithstanding the law of any state or political subdivision thereof to the contrary.'

The distinction between incorporation and choice of law is, of course, a well-

<sup>1</sup> For examples see Article IX (2) of the Agreement of 18 August 1949 and 18 April 1950 (Loan Number 17 In and 23 In) with India, or Article IX (2) of the Loan Agreement of 6 January 1949 between the Bank and Nacional Financiera S.A., a Mexican Company, and Article VI (2) of the Agreement of Guarantee of the same date with the United States of Mexico both published in the *United Nations Treaty Series*, vol. 154, pp. 4, 18. The precise date when the use of the clause was discontinued is not known, but it is no longer included in the Agreement of 18 December 1952 between the Bank and the India Iron & Steel Co. Ltd. as borrower and India as guarantor (Loan Number 71 In).

<sup>2</sup> It is believed that the last-mentioned words are intended to refer to the time when the interpretation takes place. If they should be intended to refer to the time when the contract is made, they would, indeed, involve a case of mere incorporation, not a choice of New York law.

<sup>3</sup> Sommers, Broches and Delaume, 'Conflict Avoidance in International Loans and Monetary Agreements', *Law and Contemporary Problems*, 21 (1956), pp. 463 et seq., 479. Similarly Adam, *Revue Générale de Droit International Public* (1951), pp. 41, 55, and see Broches and Boskey, *Nederlands Tijdschrift voor Internationaal Recht* (1957), pp. 159, 169. The view taken here is supported by Sereni, *Recueil des Cours*, 96 (1959), chapter iv, section 3.

<sup>4</sup> This clause occurs in all agreements made by the Bank.



known and real one,<sup>1</sup> though to draw it accurately is frequently not an easy task. Even Scrutton L.J. thought<sup>2</sup> that the clause in a contract 'to be construed in accordance with English law' required only the application of English rules of construction to a contract which in all other respects was subject to the law of Palestine. But the Judicial Committee of the Privy Council consisting of Lords Atkin, Russell of Killowen, Macmillan, Wright and Porter rejected that suggestion.<sup>3</sup> It described the distinction between the formula 'to be construed in accordance with English law' and the clause 'shall be governed by English law' as 'merely verbal'. Both clauses involve a choice of law, because<sup>4</sup>

'The construction of a contract by English law involves the application to its terms of the relevant English statutes, whatever they may be, and the rules and implications of the English common law for its construction, including the rules of conflict of laws. In this sense the construing of the contract has the effect that the contract is to be governed by English law.'

This reasoning, it is believed, is unanswerable and leads to the conclusion that where the contracts between the International Bank for Reconstruction and Development and a borrowing State refer to interpretation according to the law of New York they are subject to the law of New York. It follows, moreover, that the attempt to attribute overriding force to the tenor of the document 'notwithstanding the law of any state or political subdivision thereof to the contrary' was futile and ineffective. Similar attempts have often been made and always failed, because it is for the legal system chosen by the parties rather than the parties themselves to determine whether and to what extent the terms of the contract are superseded by changes in the law.<sup>5</sup> Nor can that clause be treated as a reference to public international law, for in the face of a reference to New York law the intention to remain unaffected by any State law cannot be equated to the intention to submit a contract to a specific legal system such as public international law. In other words, a clause which is not a choice-of-law clause but merely expresses a negative intention cannot displace a clause which affirmatively refers to and adopts a specific system of municipal law. Nor is there, finally, any advantage to be derived from the suggestion made

<sup>1</sup> See, for example, Dicey, *Conflicts of Laws* (7th ed., 1958), pp. 728, 729 and the English authorities there collected. For Germany see, in particular, Haudek, *Die Bedeutung des Parteiwillens im internationalen Privatrecht* (1931), pp. 37 et seq.

<sup>2</sup> *The Torni*, [1932] p. 78 at p. 84. In other instances the somewhat unfortunate influence of Scrutton L.J. upon public and private international law in England was not so soon rectified by a superior tribunal.

<sup>3</sup> *Vita Food Products v. Unus Shipping Co. Ltd.*, [1939] A.C. 277.

<sup>4</sup> At p. 298 *per* Lord Wright.

<sup>5</sup> The problem has frequently arisen in connexion with gold clauses and has invariably been dealt with in the sense put forward in the text: for references see Mann, *The Legal Aspect of Money* (2nd ed., 1953), p. 266. The point is really an obvious one and it is difficult to understand why draftsmen of important international documents continue to insist upon the insertion of clauses which cannot be effective.

by a Belgian author<sup>1</sup> that the clause purporting to confer exclusive effect upon the terms of the contract was 'capitale', 'exclut toute application du droit interne d'un Etat quelconque . . . et fait du contrat lui-même la seule loi des parties'. This is, of course, not possible, for a contract which is not subject to a specific legal system, whether it be a municipal law or international law, is inconceivable.

If, as is undeniable, international persons are at liberty to, and in fact do, submit their treaties to a system of municipal law by virtue of an express clause, such a choice of law may occur also impliedly, and it thus becomes a matter of the parties' intention whether public international law or a system of municipal law is the proper law applicable to the contract.<sup>2</sup> This intention is to be ascertained in the same way as private international lawyers employ, when they have to ascertain the proper law of the contract. The submission of a treaty to a municipal system of law is, however, so unusual a step that it ought not to be inferred from other than the most compelling evidence.

No such evidence exists in the case of the Loan Agreement made on 23 April 1954 between the United States of America and the European Community for Coal and Steel,<sup>3</sup> or the supplementary Pledge Agreement made between the European Community for Coal and Steel as borrower and the Bank for International Settlements.<sup>4</sup> It has been said<sup>5</sup> that both are subject to 'droit américain'. This conclusion is being based on the fact that the Loan Agreement was concluded in the United States, that the money was raised and is to be repaid there, that dollars constitute the money of account, that the Agreement is made in the English language and that the terminology 's'en réfère au droit anglo-saxon'. It is, however, obviously impossible to speak of an American or an Anglo-Saxon law of contract,

<sup>1</sup> Jean Salmon, *Le Rôle des Organisations Internationales en matière de Prêts et d'Emprunts* (1958), p. 228. Of the clause referring to the law of New York Salmon says *loc. cit.* that it 'ne doit tromper personne. Interpréter à la lumière d'un droit, ce n'est pas appliquer un droit.' This is one of the many observations which show that the learned author has failed to appreciate the manifold problems of public and private international law to which he alludes. See also below, p. 49.

<sup>2</sup> This is now accepted by Jessup, *A Modern Law of Nations* (1948), pp. 139 et seq.; Martin Wolff, *Deutsches Internationales Privatrecht* (3rd ed., 1955), p. 144 and Van Hecke, *Problèmes Juridiques des Emprunts Internationaux* (1955), pp. 29 et seq.; Sereni, *Recueil des Cours*, 96 (1959), chapter ii, section 3, who, however, overrates the significance of registration. Perhaps it may be mentioned here that the question whether a document is a 'treaty' or an 'international agreement' within the meaning of Article 102 of the Charter of the United Nations and therefore requires registration has nothing to do with the problem discussed in the text. An agreement may be caught by Article 102, although it is subject to a system of municipal law. Conversely, an agreement may be subject to public international law, though it does not come within the ambit of Article 102. On Article 102 see Broches and Boskey (above, p. 38, n. 3) and Lauterpacht, *Report and Second Report on the Law of Treaties* (U.N. Doc. A/CN.4/63 p. 27 and A/CN.4/87, p. 10).

<sup>3</sup> *United States Treaties and Other International Agreements*, V (1954), Part 1, p. 525 (TIAS 2945), and Part 3, p. 2647 (TIAS 3126).

<sup>4</sup> *Ibid.*, Part 3, p. 2655. For further discussion of this Agreement see below, p. 53.

<sup>5</sup> Blondeel and Vander Eycke, *Revue de la Banque* (1955), pp. 249, 274, whose arguments recall the unfortunate decision of the Swiss Federal Tribunal referred to below, p. 52, n. 4.

neither of which exists. The place of the contract as well as the place of performance are inconclusive factors when international persons contract among themselves. Since the family of nations has no currency system of its own, no inferences can be drawn from the use of a certain national currency. For similar reasons no weight should be attached to the use of a particular language, least of all the English language. In all the circumstances it is clearly preferable to submit the Loan Agreement to public international law,<sup>1</sup> and the same solution should apply to the Pledge Agreement, though the latter suggestion raises different problems to the consideration of which it is now necessary to turn.

## II

1. Contracts between an international person, on the one hand, and a natural person or a legal person created under a domestic legal system, on the other hand, are, as a rule, governed by the system of municipal law chosen by the parties.

Here again the starting-point is free from doubt. The familiar problem of the conflict of laws as to how, in the absence of an express reference, the proper law is to be found need not, for present purposes, be pursued with particularity. It is only necessary to warn against the inclination to overrate the significance of the problem whether there exists a presumption in favour of the law of the contracting international person, i.e. State.<sup>2</sup> Those who, like the Permanent Court of International Justice<sup>3</sup> or the German Supreme Court,<sup>4</sup> contended in favour of such a presumption did not contemplate more than a readily rebuttable presumption. On the other hand, those who reject the presumption do not doubt that in searching for the proper law 'great weight'<sup>5</sup> or 'considerable weight'<sup>6</sup> or 'great, if not decisive, weight'<sup>7</sup> is to be attached to the fact that one of the contracting parties is a State. The practical difference between both methods of approach is, accordingly, likely to be small, yet the existence of a presumption must

<sup>1</sup> In the same sense Sommers, Broches and Delaume (above, p. 38, n. 3) at p. 478; Sereni, *Recueil des Cours*, 96 (1959), chapter ii, section 4, and Salmon (above, p. 40, n. 1), p. 292. The latter author reaches the correct result, because for him 'l'application d'une loi locale est écartée par le fait que les deux contractants réels sont des sujets de la communauté internationale'. His reasoning thus rests on the obsolete theory that international persons cannot contract between themselves otherwise than on the footing of public international law. He has unfortunately failed to provide any argument in support of that theory.

<sup>2</sup> In the case of an international subject other than a State the presumption cannot, of course, operate. See below in the text.

<sup>3</sup> In the case of the *Serbian and Brazilian Loans*, Series A, Nos. 20/21, 42, 121, 122.

<sup>4</sup> 14 November 1929, RGZ 126, 196, at p. 206.

<sup>5</sup> *International Trustee for the Protection of Bondholders A.G. v. The King*, [1937] A.C. 500, 531 *per* Lord Atkin; for other decisions belonging to this group see Van Hecke, *Problèmes Juridiques des Emprunts Internationaux*, p. 71.

<sup>6</sup> *Ibid.*, p. 567, *per* Lord Maugham.

<sup>7</sup> *Bonython v. Commonwealth of Australia*, [1951] A.C. 201, at p. 221 *per* Lord Simonds.



be denied, for it could be of no use in those numerous cases in which the contract is made with international persons who are not States and who, therefore, do not possess their own legal system.

It is perhaps more important to state that the application of the principle has not always been satisfactory, and, although the point may not be wholly germane to the main argument developed in these pages, its elaboration within the context of an article on the contracts of international persons is likely to be permissible. No criticism, it is true, can be levelled against the line taken by Lord Simonds delivering the opinion of the Privy Council in *Bonython v. Commonwealth of Australia*.<sup>1</sup> In that case bonds issued by the Governor-in-Council by the authority of the Parliament of Queensland under the Act 58 Victoria No. 32 were held to be subject to the law of Queensland. Lord Simonds said:<sup>2</sup>

‘As has been pointed out, the debentures were issued on the authority of a Queensland Act which empowered the Governor-in-Council to raise by way of loan not more than £2,000,000 for the public service of the Colony. By the same Act the loan was secured on the public revenues of the Colony, and was made repayable on January 1, 1946. These circumstances cannot but be of great, if not decisive, weight in determining what is the proper law of the contract.’

It is, however, not easy to reconcile this decision with the view adopted by the House of Lords in *International Trustee for the Protection of Bondholders A. G. v. The King*<sup>3</sup>—a case which provokes criticism also on another point. It will be remembered that it concerned bearer bonds issued by Great Britain in New York in 1917. The issue was made in pursuance of the War Loan Act, 1916, which authorized the Treasury to contract a loan of \$250,000,000 and to repay it out of public funds. Relying on this provision Sir William Jowitt argued<sup>4</sup> that it was inconceivable that a foreign legislator such as the United States of America could increase or, by abrogating the gold clause, reduce the liability of the Crown. Yet it was held by the House of Lords that the War Loan Act, 1916, was ‘a domestic matter which only concerns the authority to pay’<sup>5</sup> and carried no weight in determining the proper law. The House of Lords preferred the view that the bonds were subject to the law of New York. It may well be that this solution could be readily defended by the wording and form of the bonds. But the House of Lords supported it primarily by the American character of certain antecedent transactions which were not reflected in the bond. Such reasoning, it is believed, ran counter to the legal nature of a bearer bond which is a negotiable instrument, to the whole tradition of the law merchant and to the practical requirements and the experience of a sound bond market. As Nussbaum has said,<sup>6</sup> the law of negotiable instruments does not permit

<sup>1</sup> [1951] A.C. 201.

<sup>2</sup> p. 221.

<sup>3</sup> [1937] A.C. 500

<sup>4</sup> p. 527.

<sup>5</sup> p. 532 *per* Lord Atkin.

<sup>6</sup> *Money in the Law, National and International* (1950), pp. 424–6.

'an interpretation vitally affecting the rights of the bondholders to be based on circumstances entirely outside the bond'. The House of Lords does not seem to have given consideration to a point which, it is submitted, carries great force and ought to have made the evidence of the earlier documents inadmissible.

2. It is possible, however, for contracts between parties only one of whom is an international person to be subject to public international law.<sup>1</sup>

A reconsideration of this submission demands an inquiry into (a) its scope and effect, (b) its legal justification, (c) its illustration by an express or implied choice of law, and (d) its status in the light of the practice developed in the course of certain arbitrations.

(a) According to the theory referred to, a contract could be 'internationalized' in the sense that it would be subject to public international law *stricto sensu*; that, therefore, its existence and fate would be immune from any encroachment by a system of municipal law in exactly the same manner as in the case of a treaty between two international persons; but that, on the other hand, it would be caught by such rules of *jus cogens* as are embodied in public international law.

The public international law which would prevail and which the domestic judge or arbitrator having jurisdiction over the contract would apply in all matters governed by the proper law of the contract, would largely be derived from those principles of law accepted *semper ubique et ab omnibus*, which govern the treaties, particularly the 'commercial treaties', between international persons and which were shortly referred to above. This means that there is little force in the objection made by Martin Wolff<sup>2</sup> and others,<sup>3</sup> according to which the 'internationalization' of a contract could in practice not be carried out, because public international law has allegedly not yet succeeded in developing, or sufficiently developing, the necessary

<sup>1</sup> In the same sense Jessup, *A Modern Law of Nations* (1948), pp. 139 et seq., but especially Lord Asquith of Bishopstone as Sole Arbitrator in the matter of an arbitration between *Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*; *International and Comparative Law Quarterly*, 1 (1952), p. 247, at p. 251; *Int. L.R.* (1951), p. 144. The following observations do not in any way contemplate that doctrine which is unique to France, which is unacceptable as a principle of law and unattractive *de lege ferenda* and according to which in the event of a *paiement international* the parties are at liberty 'de convenir, même contrairement aux règles impératives de la loi interne appelée à régir leur convention, une clause valeur-or'; Cass. Civ. 21 June 1950, *Clunet* 1950, 1196; 24 January 1956, *Clunet* 1956, 1012; Trib. Com. Seine, 11 March 1957, *Clunet* 1958, 994 (*Messageries Maritimes*). For the time being this practice relates only to gold clauses and Goldman (*Clunet* 1958, 1000) goes, therefore, too far when he speaks of 'l'édifice de l'immunité financière internationale'. If that practice were extended, it would lead to the submission to public international law of contracts between private persons. Contrary to the suggestion in the text it would apply to contracts to which no State is a party; this would be an unacceptable solution. The theoretical basis, too, would be entirely different from that developed here.

<sup>2</sup> *Private International Law* (2nd ed., 1950), p. 417 and *Transactions of the Grotius Society*, 35 (1950), pp. 143, 150-2.

<sup>3</sup> Fawcett, in this *Year Book*, 25 (1948), p. 44, n. 3; Friedmann, *American Journal of International Law* (1956), pp. 483, 484, also in *Law in a Changing Society* (1959), p. 472.

legal rules. Such an argument overlooks the fact that in regard to treaties between international persons, the nature and subject-matter of which frequently are not substantially different from contracts between international and private persons, those legal rules have been, or are capable of being, and, in any event, must be developed. The law which is available for application to the one type of contractual arrangement, can, without difficulty, be applied to the other group of contracts. And the material as well as the method of judicial reasoning with which an international tribunal may and, indeed, must equip itself may likewise lead the experienced judge or arbitrator of a domestic tribunal to a decision: it would be both wrong and disrespectful to suggest that the judge of a domestic tribunal has necessarily less ability in ascertaining the relevant rules of international law than the international judge. This is a conclusion which will be disapproved only by those who are not fully alive to public international law and its factual background or are inclined to underestimate its vitality and its potentiality.

Furthermore, what is being contemplated is a reference to public international law in the sense of a real choice of law, a reference such as, in regard to type, quality and effect, is familiar to the conflict of laws and opposed to mere incorporation (*materiellrechtliche Verweisung*).<sup>1</sup> Hence it is impossible, or would at any rate be inexact, to speak of the application of the general principles of law recognized by civilized nations. The general principles are not a law or a legal system that can be applied or referred to. If it was only the application of those principles that was being envisaged, then the internationalization of a contract would not be different in character from a contract which the parties have submitted, say, to Roman law or into which they have embodied the Sale of Goods Act, 1893: the parties would have done no more than to provide for the incorporation of certain rules of public international law, however far-reaching or extensive they may be, and the contract as such would remain subject to the legal system applicable to it, so that, to mention only one of many consequences, changes introduced in that legal system would affect it. One of the main purposes of a true 'internationalization' of a contract would fail in that the contract would be subject to rather than exempt from interference by its proper law. (It is, of course, necessary to guard against mere terminological sophistry. The reference to the general principles will not usually be mere incorporation, but will be tantamount to a reference to or a choice of public international law as the governing law.<sup>2</sup> This, however, is not necessarily so.) The fundamental distinction which it has been attempted to draw is liable to

<sup>1</sup> On these terms see above, p. 39, n. 1.

<sup>2</sup> See below, p. 51. It is likely that the editors of Dicey, *Conflict of Laws* (7th ed., 1958), p. 736 merely commit a terminological *lapsus* and contemplate the application of public international law, when they mention the application of the general principles of law.



be overlooked. Lord McNair,<sup>1</sup> who has recently given attention to the problem of internationalization, somewhat surprisingly considers the general principles as affording, in certain cases, 'the choice of a legal system', and, indeed, describes them as a 'system of law'.<sup>2</sup> Yet it is hardly open to doubt that, unless they are equiparated to public international law, the general principles are not a legal system at all, and Lord McNair clearly refuses so to equiparate them. For he submits that the contracts he has in mind are not 'governed by public international law *stricto sensu*', but 'should be governed by the general principles of law recognised by civilised nations'. The contrast so created is one, not of terminology, but of substance, since Lord McNair explains that in his view public international law cannot apply, because 'this system is an inter-State system—*jus inter gentes*', and the contracts under discussion 'are not inter-State contracts and do not deal with inter-State relations'.<sup>3</sup> This argument does not, it is respectfully submitted, do justice to the nature of a genuine choice of law, a reference to a legal system. Moreover, if a choice of public international law is possible at all<sup>4</sup> it cannot miscarry merely by virtue of the fact that normally<sup>5</sup> public international law regulates relations between international persons. Swiss law is an 'inter-Swiss system' and envisages legal relations between Swiss citizens, 'inter-Swiss relations'. Yet no student of the conflict of laws would challenge the view that, if an Englishman and an Italian submit their contract to Swiss law, this legal system applies also to the contractual relations between the Englishman and the Italian by virtue of the choice of law, by virtue of the reference permitted by private international law and notwithstanding the inter-Swiss character of Swiss law. Nor is it doubtful that, for the same reason, the *jus cogens* included in either English or Italian law does not affect a contract governed by Swiss law, but that Swiss *jus cogens*, whether it is anterior or subsequent to the contract, does touch it. It follows that Lord McNair must allow the *jus cogens* of the proper law to override the general principles which are merely incorporated into it. It is thus not unlikely that his interpretation of the 'internationalization' of contracts defeats one of the very objects which that doctrine is intended to achieve, and which, it is believed, he desires to accomplish.

(b) The question whether and under what circumstances it is open to an international person<sup>6</sup> and a private person to submit their contract to public

<sup>1</sup> This *Year Book*, 33 (1957), p. 1, particularly at pp. 6, 10, 19. Similarly already Fawcett, *ibid.*, 30 (1953), p. 399, and Sereni, *Recueil des Cours*, 96 (1959), chapter iv, sections 4 and 5.

<sup>2</sup> pp. 1, 19.

<sup>3</sup> On this point see section (b) below.

<sup>4</sup> This qualification would in any event be required, for the statement that public international law is only an inter-State system of law is no longer accurate.

<sup>5</sup> It seems likely that 'internationalization' should also be permitted where the contract is concluded, not by the international person itself, but by one of its instrumentalities, including a State corporation.

pp. 10, 19.

international law relates to the doctrine of the proper law in private international law rather than to public international law.

According to most legal systems the principle is firmly established: it is left to the parties to choose the proper law. Whether their choice is subject to any restrictions is being much discussed by legal writers, but none of the numerous formulas which are designed to limit the parties' freedom of choice would preclude the choice of public international law where a contract with an international person is in question and where, therefore, by the nature of things a close connexion with public international law exists from the outset. The fear lest the admission of a reference to public international law might involve political or social dangers would be justified if and only if its unrestricted recognition, particularly as between private persons, were being advocated.

It is, moreover, true that the conflict of laws has in mind the localization of legal relationships and that, therefore, the conflict rule normally refers to a locally defined legal system. But this is no more than a form of words from which no dogma should be derived. When Savigny uses the well-known metaphor of the 'seat of a legal relation', he certainly contemplates territorially defined systems of law. But an all too literal interpretation would not be in harmony with his genius. Von Bar's phrase of the 'nature of the thing', Gierke's formula of the centre of gravity, and especially Westlake's figure of the law with which a contract has the most real connexion no longer maintain the idea of localization<sup>1</sup> and prove that the reference to a legal system which is not territorially defined is fully reconcilable with the traditional doctrine of the conflict of laws. In any event, it must be emphasized, considerations of a conceptualist character cannot be decisive. The real justification of the possibility of 'internationalization' is provided by the requirements of international intercourse. There are cases in which no solution other than the choice of public international law is practicable. In particular, States are frequently not prepared to submit to foreign law, while private persons either refuse to submit to the law of the contracting State or would be willing to do so, but are confronted with the absence of any such law; the latter difficulty arises, for instance, in connexion with certain undeveloped States of the Middle East and Africa. In such circumstances the reference to public international law is often the expedient which satisfies the factual conditions, the interests of the parties and the demands of a progressive economic policy.

Nor is the theory of the possible 'internationalization' of contracts defeated by the exception to the control of the proper law which was propounded by Dicey and according to which a contract is, in general, invalid in so far as

<sup>1</sup> See the helpful remarks made by Martin Wolff, *Private International Law* (2nd ed., 1950), p. 37, n. 2, p. 425, n. 1.

its performance is unlawful by the law of the country where the contract is to be performed.<sup>1</sup> This exception might be said to be relevant in circumstances which are exemplified by the following set of facts: By a contract governed by public international law an English firm has undertaken towards the Government of Utopia to build a railway in Utopia at a price of £100 a foot. While operations are proceeding Utopia enacts legislation prohibiting the building of railways at a price exceeding £50 a foot. If Dicey's exception was good law, the contract would be discharged as a result of the supervening Utopian legislation and the contractors would be left without a cause of action, notwithstanding the submission of the contract to public international law. In other words, in many crucial cases the 'internationalization' of a contract would not afford protection against encroachments by the contracting State. In truth, however, this danger does not exist. In the first place, the exception does not seem to have support anywhere outside England and, perhaps, the Commonwealth. Secondly, however, in spite of the judicial approval frequently and emphatically, though invariably obiter, given to the exception<sup>2</sup> it may be confidently asserted that it does not form part of the conflict of laws at all, but is a rule of the English law of contracts, an aspect of the English doctrine of frustration.<sup>3</sup> If this is correct, then the consequences of any legislation by the State in which performance takes place are to be judged exclusively by the proper law, i.e. public international law, not by that State's law, the *lex loci solutionis*. The question what effect public international law attributes to the *lex loci solutionis* lies outside the scope of this article, but admits of a short and unequivocal answer: no State can avoid its international obligations by invoking its own or, indeed, any municipal law.<sup>4</sup>

Finally, the 'internationalization' of contracts is by no means precluded by the dictum of the Permanent Court of International Justice,<sup>5</sup> according to which

'any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country'.

The pedant may argue that the 'internationalization' of a contract is reconcilable with this dictum, because an internationalized contract is in fact based on the municipal law, viz. on the private international law of

<sup>1</sup> *Conflict of Laws* (7th ed., 1958), p. 788.

<sup>2</sup> They are collected by Dicey, *op. cit.*, p. 788, n. 6.

<sup>3</sup> This submission was first made in this *Year Book*, 18 (1937), pp. 97, 103 et seq., and has since been adopted by a number of legal writers, particularly by Cheshire, *Private International Law* (5th ed., 1957), pp. 236 et seq., and others referred to by Dicey, *op. cit.*, p. 790, n. 11, where it is also made fairly clear that if they did not feel bound to pay lip-service to Dicey's exception his editors would delete it from a work devoted to the conflict of laws.

<sup>4</sup> See, for instance, *Treatment of Polish Nationals in Danzig* (1932), Series A/B, No. 44, p. 24; *Free Zones of Upper Savoy and the District of Gex* (1932), Series A/B, No. 46, p. 167.

<sup>5</sup> *Serbian Loans* (1929), Series A, Nos. 20/21, p. 41.



some country, and is referred by that law to public international law. A more convincing argument is to the effect that in 1929 the Permanent Court of International Justice cannot have intended, by a dictum unsupported by reasons, to negative a progressive development of the law by a doctrine of internationalization. Nor did that Court have the power of doing so. It is true that a different but all too literal effect was attributed to the Permanent Court's dictum by the Arbitrators in the dispute between *Saudi Arabia and The Arabian American Oil Company (Aramco)*, Professor Sauser-Hall, Mr. Mahmoud Hassan and Sir Saba Habachy,<sup>1</sup> who stated that<sup>2</sup>

'as the Agreement of 1933 has not been concluded between two States, but between a State and a private American corporation, it is not governed by public international law'.

It is, however, doubtful, how much weight can be attached to the Arbitrators' decision which is perhaps not characterized by an outstanding degree of precision or conciseness<sup>3</sup> and which, moreover, does seem to permit a measure of internationalization, as appears from the following sentence:<sup>4</sup>

'The Tribunal holds that public international law should be applied to the effects of the Concession, when objective reasons lead it to conclude that certain matters cannot be governed by any rule of the municipal law of any State, as is the case in all matters relating to transport by sea, to the sovereignty of the State on its territorial waters and to the responsibility of States for the violation of its international obligations.'

Although this remark is far from clear, it may not be entirely consistent with the earlier dictum which may thus suffer a further loss of authority.

While the foregoing reasons tend to support or, at any rate, not to disprove the theory of an internationalization of contracts, they render it impossible, on the other hand, to subscribe to certain suggestions which, without consideration of the whole of the available material or of the teachings of

<sup>1</sup> This Award has not yet been published. The references are to a privately printed copy.

<sup>2</sup> p. 58.

<sup>3</sup> When the reader has reached p. 68 and perhaps only p. 102, the real nature of the issue and its remarkable simplicity become apparent. The question was whether a Concession Agreement of 1933 conferred upon Aramco the exclusive right to transport across terrestrial and maritime frontiers of Saudi Arabia. The Arbitrators held that the answer was in the affirmative. Since they also held that ratification of Agreements by Royal Decree did not affect their 'purely contractual nature' (pp. 99, 100), it was obvious that the rights granted by the Agreement of 1933 could not be prejudiced by a later inconsistent Agreement made between Saudi Arabia and Mr. Onassis. The Award is not an international decision at all, but belongs to the group of cases referred to below, p. 54.

<sup>4</sup> p. 65. The sentence states that at any rate in respect of certain matters a contract may be internationalized. But the examples given are not matters which come within the province of the proper law chosen by the parties and to 'be applied to the effects of the Concession'; on the contrary, at least two out of the three examples are matters which are of necessity subject to public international law, irrespective of it being or not being 'applied to the effects of the Concession'.

private international lawyers, Professor Verdross recently put forward.<sup>1</sup> He speaks of the 'quasi-public-international contract'<sup>2</sup> between a State and an alien corporation, whereby 'a specific concession granted to such a corporation is submitted to the *lex contractus* of this contract'.<sup>3</sup> Such contracts are said to be governed neither by the municipal law of a State nor by public international law, 'as they are not concluded between international persons'.<sup>3</sup> Accordingly, they constitute 'a third group of contracts, which is characterised by the fact that it subjects such private rights as the contract establishes to a new legal system created by the agreement of the parties, that is to say, to the *lex contractus* agreed by them'.<sup>3</sup> Such *lex contractus* 'created by a quasi-public-international contract is an independent legal system which exhaustively regulates the relations between the parties. Naturally, for the purpose of construing its provisions and of filling possible gaps the *lex contractus* may refer to the legal system of the contracting State or to the legal system of the other party or to public international law, but all these legal systems are applicable only in so far as they are substituted by the *lex contractus*, as this defines the parties' mutual rights and duties in a sovereign manner.'<sup>4</sup>

The idea that contracting parties are at liberty not only to choose the legal system applicable to their contract, but also to create their own legal system which is independent, exhaustive and sovereign and to which municipal systems of law and public international law are inferior—that idea is doctrinally so unattractive, so impracticable, so subversive of public international law, so dangerous from the point of view of legal policy and so unnecessary that its novelty will not cause surprise. It hardly requires emphasis that every legal relationship in general and every contract in particular must of necessity be governed by a system of law and is otherwise unthinkable.<sup>5</sup> Of course, in the words of the Code Civil,<sup>6</sup> 'les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites'; but freedom of contract does not exist independently of the legal system which grants it or confer any measure of sovereignty upon the contracting parties. Nor can contracts either in law or in fact regulate the parties'

<sup>1</sup> *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 18 (1958), p. 635.

<sup>2</sup> This expression is said to have been used by Schwarzenberger, *International Law* (3rd ed., 1957), vol. 1, p. 578. However, discussing the place of unjustified enrichment in public international law and the Award in the case of *Lena Goldfields Ltd.* (below, p. 55), Dr. Schwarzenberger says merely that the latter 'belongs in the sphere of quasi-international law'. This phrase is different from, and certainly less objectionable than, Verdross' term mentioned in the text. It may be added that, adopting accepted terminology, Dr. Schwarzenberger (pp. 146 et seq.) speaks of public contracts which, if concluded between an international person and foreign nationals, 'are not necessarily excluded from international law' (p. 146). Though this formulation is perhaps capable of clarification, the learned author later (pp. 147, 149) states that a public contract, while normally governed by municipal law, may be subject to international law. This is not very different from the submission repeated in the present article.

<sup>3</sup> p. 638.

<sup>5</sup> See already above, p. 40.

<sup>4</sup> p. 641 (italics supplied).

<sup>6</sup> Article 1134.

relationship exhaustively. Contracts are written against the background of a system of law, its *jus cogens*, its rules of construction and so forth. Recognizing this Professor Verdross proposes to reverse the usual order and to allow such a system of law to operate only if and in so far as the parties refer to it. In many cases, perhaps, this view will lead, in a circuitous way, to results which are identical with those reached by familiar doctrine. It remains, however, remarkable that Professor Verdross who first proclaims the dogma that contracts 'not concluded between international persons' cannot be subject to public international law considers it possible for parties to refer to public international law as a subsidiary source of law. An international lawyer, in particular, cannot give approval to a theory according to which there is any *lex* higher than, or uncontrolled by, public international law. Can the *lex contractus* created by the parties validate a contract which is not only contrary to elementary demands of a domestic *ordre public*, but also violates fundamental human rights? If Nazi Germany had granted to a Ruritanian corporation the contractual right to carry on commercially some of her opprobrious activities, would that contract really have been sovereign and could no legal system have condemned it? And why, so one asks in conclusion, should a doctrine such as that propounded by Professor Verdross be necessary? Its object can be directly and in a less radical manner achieved by the internationalization of contracts, which Professor Verdross admits only indirectly, i.e. where the *lex contractus* refers to public international law. If there is any force in the unsubstantiated dogma according to which international law cannot apply except as between international persons and which Professor Verdross seems to put forward as the only objection to internationalization as suggested here, then one would expect the indirect no less than the direct reference to public international law to be rejected.

(c) If it is open to contracting parties, one of whom is an international person, to choose public international law as the proper law of their contract, the exercise of their choice becomes a matter of their intention, whether it be express or implied.<sup>1</sup>

No contract could be found, which the parties in terms submitted to public international law as such (as opposed to the general principles of law). But it would seem to be legitimate to treat a clause which provides for the jurisdiction of the International Court of Justice as equivalent to such a submission. A recent example of this type of clause is, it appears, contained in the Loan Agreement which the Belgian Régie des Télégraphes et Téléphones as borrower and the Belgian State as guarantor contracted

<sup>1</sup> Rabel, *Conflict of Laws*, vol. 3 (1950), pp. 14, 15 described it as 'confusing' to believe that a contract was internationalized, delocalized or deprived of its national character merely because one party to it was a State. No such suggestion has ever been made by anyone; it has certainly not been made by the present writer.



in the year 1947 with a group of Swiss bankers and which provides that all disputes 'shall be decided exclusively by the International Court of Justice in The Hague, or in default thereof by the Swiss Federal Tribunal at Lausanne'.<sup>1</sup> It is clear that this clause is primarily intended to deal with jurisdiction and it is in that very connexion that it may lead to considerable difficulties.<sup>2</sup> But irrespective of the problem of jurisdiction and whichever tribunal ultimately assumes jurisdiction, the old rule *qui elegit judicem elegit jus* must be given effect, at any rate where the circumstances are so peculiar.<sup>3</sup>

Similarly, an express reference to public international law will usually be embodied in a clause providing for the application of the general principles of law.<sup>4</sup> What may be the first of such clauses is to be found in the concession which Persia granted in 1933 to the Anglo-Persian Oil Co. Ltd. and which directed arbitrators to base their award 'on the juridical principles contained in Article 38 of the Statutes of the Permanent Court of International Justice'.<sup>5</sup> The more elaborate Article 46 included in the so-called Consortium Agreement which after the termination of the concession of 1933 was concluded with a group of international oil companies is to the same effect:<sup>6</sup>

'In view of the diverse nationalities of the parties to this Agreement it shall be

<sup>1</sup> The text does not seem to have been published. The above remarks are based on the information given by Delaume, *American Journal of Comparative Law*, 6 (1957), pp. 189, 206 who, however, hardly does justice to the clause. The Federal Tribunal has jurisdiction only, when the International Court of Justice has ceased to exist. So long as it does exist, it has sole jurisdiction. For this reason and in view of the fact that the clause determines the proper law it cannot be described as a 'sham provision'. See also the following note.

<sup>2</sup> As Delaume (above, n. 1) rightly points out, the International Court of Justice has jurisdiction only in respect of disputes between States. A clause such as that mentioned in the text or on p. 20 of the article referred to above, p. 34, n. 2 will, therefore, have to be construed as meaning that the contracting State submits to the jurisdiction of The Hague Court and recognizes the right of the State to which the contracting private persons belong to invoke the jurisdiction of The Hague Court for the benefit or in the interest of such persons.

<sup>3</sup> On the other hand, the fact that the decision of disputes by a municipal tribunal must have been within the contemplation of the parties does not by any means exclude their intention to submit the contest to public international law. Only the express choice of a court usually implies the choice of the law of such court.

<sup>4</sup> See already above, p. 44.

<sup>5</sup> See Article 22 (F), also Article 21 of the Concession which is printed in Cmd. 8425, p. 17 and by Hurewitz, op. cit., vol. 2, p. 188. It was held in the *Anglo-Iranian Oil* case, *I.C.J. Reports*, 1952, pp. 111, 112, that the Concession was not a treaty or convention within the meaning of the declaration whereby Persia accepted the jurisdiction of the International Court of Justice. This was no doubt correct, but has nothing to do with the question discussed in the text. The Concession of 1933 led to one of the gravest injustices which the history of international law records: for reasons and in circumstances which are discussed by Johnson, in this *Year Book*, 30 (1953), p. 152 and which can only be deplored, the arbitration clause became abortive, and in Italy and Japan the Courts failed to give redress against an obvious international tort: Court of Venice, 11 March 1953, *Foro Italiano* (1953), i, p. 719 or *Int. L.R.* (1955), p. 19; Civil Court of Rome, 13 Sept. 1954, *Foro Italiano* (1955), ii, p. 256 or *Revue Critique* (1958), p. 519 with note by De Nova or *Int. L.R.* (1955), p. 23; Court of Appeal Tokyo, *Int. L.R.* (1953), p. 305. The reasoning of these decisions to the effect that the Persian legislation afforded adequate compensation is wholly unconvincing.

<sup>6</sup> The text is published by Hurewitz, op. cit., vol. 2, p. 346. Similarly Article 40 of the Agreement

governed by and interpreted and applied in accordance with the principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles then by and in accordance with principles of law recognized by civilized nations in general, including such of those principles as may have been applied by international tribunals.'

In a much-discussed concession made in 1939 the parties declared 'that they base their work in this Agreement on goodwill and sincerity of belief and on the interpretation of this Agreement in a fashion consistent with reason'. Of this clause Lord Asquith of Bishopstone as Sole Arbitrator declared<sup>1</sup> that it was inconsistent with the idea

'that the municipal law of any country, as such, could be appropriate. The terms of that clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilized nations—a sort of "modern law of nations" '.

This statement, which provides the most authoritative support for the doctrine of the 'internationalization' of contracts, rightly regards words of a very general character as a sufficiently clear reference to public international law.

The most frequent case of an implied reference is that of the contract of employment made by every member of the international civil service. These contracts, which raise numerous problems and the detailed consideration of which would far exceed the scope of the present observations,<sup>2</sup> are, of course, primarily subject to the staff codes or staff regulations which so many international organizations have put into force. But these codes or regulations themselves are governed, and gaps are filled, by public international law. Nothing else is or can be intended by the statement, often encountered in legal literature, but meaningless unless understood in the sense suggested here, that such employment contracts are governed by the internal law of the organization, 'le droit interne de l'organisation'.<sup>3</sup>

There remain numerous agreements of a financial character, the construction of which leads to the inference that they are governed by public international law.<sup>4</sup> Among them pride of place is due to the loan agreements

made in September 1957 between an Italian Oil Company and the National Oil Company of Iran: Wall, *International and Comparative Law Quarterly*, 7 (1958), pp. 736, 739. The last-mentioned company is not an international person, but an instrumentality of the Persian State, and this is likely to be sufficient to permit internationalization: see above, p. 45, n. 6.

<sup>1</sup> For references see above, p. 43, n 1.

<sup>2</sup> For numerous cases on the rights and liabilities of international officials see the recent volumes of *International Law Reports*.

<sup>3</sup> This is the phrase used, for instance, by Bastid, 'Les Tribunaux Administratifs Internationaux et leur Jurisprudence', *Recueil des Cours*, 92 (1957), pp. 347, 471, et seq. Similarly Sereni, *Recueil des Cours*, 96 (1959), chapter i.

<sup>4</sup> Some of the earlier ones are referred to in the paper referred to in n. 2 on p. 34 above. Even today the Young-Loan (published by Hudson, *International Legislation*, vol. 5, p. 575) is likely

made in recent years by the International Bank for Reconstruction and Development with private borrowers and guaranteed by the State to which the borrowers belong.<sup>1</sup> The terms of these agreements are silent about the proper law. The jurisdiction of municipal courts is excluded by an arbitration clause. It cannot reasonably be held that the Bank intended to be subject to the law of the borrower's nationality or residence. It is equally unlikely that the parties intended to apply the law of the District of Columbia, as opposed to the law of New York, Canadian or English law, merely because the Bank's seat is in Washington D.C. The very fact that the proper law is not defined, that arbitration is provided for and that every loan to a private borrower is supplemented by a State guarantee is a compelling reason for applying a legal system which permits and assures the control of the general principles of law. And though it is possible for the principal debt and the guarantee to be subject to different legal systems, it is, in the absence of express regulation, legitimate to impute to the parties the intention to submit two closely connected transactions to a single legal system. It would certainly be a less attractive solution if the contract between the Bank and the borrower were held to be governed by some undefined system of municipal law and the contract between the Bank and the State guarantor were subject to public international law.

Similar arguments justify the conclusion that the 'Act of Pledge' made on 28 November 1954 by the High Authority of the European Coal and Steel Community<sup>2</sup> is subject to public international law.<sup>3</sup> This document was executed for the purpose of securing the notes which the High Authority might issue to lenders, 'by pledge of the obligations which the High Authority shall receive from the enterprises to which it relends the borrowed funds'. The Act of Pledge, it is true, was declared before a Notary in Luxembourg and constitutes a contract with the Bank for International Settlements, a Swiss company. Yet it has no substantial connexion with the law of either Luxembourg or Switzerland, the only systems of municipal law which could possibly have been intended by the parties.<sup>4</sup> As in the case

to be most interesting. Its interpretation by the Swiss Federal Tribunal in the decision BGE 62 II 140 remains highly unsatisfactory.

<sup>1</sup> The view that these agreements are subject to public international law is shared by Adam (above, p. 38, n. 3), pp. 55 et seq., and Sommers, Broches and Delaume (above, p. 38, n. 3), p. 477, though without detailed discussion. The clause set forth above, p. 38, n. 4 is of some significance in the present connexion, for, although it does not contain a choice of law or a reference to public international law, in cases in which there is no such choice or reference it is one of the elements leading to the ascertainment of the parties' intention.

<sup>2</sup> See above, p. 40, n. 4.

<sup>3</sup> Against this view, in particular, Blondeel and Vander Eycke, above, p. 40, n. 5, and Sereni, above, p. 38, n. 3.

<sup>4</sup> Although the document is expressed in the English language, it can hardly be suggested that it is subject to the law of any country in which the English language is used: nothing in the Agreement points to the law of the District of Columbia, New York or any other of the States of the Union, of Canada, England, Australia and so forth. 'Anglo-Saxon law' does not, of course, exist. Sereni, *op. cit.*, suggests that Swiss law should apply.



of the Young-Loan, no solution other than the application of public international law would appear to be reasonable and practicable.

(d) On the other hand, it must be emphasized that there is no room for the doctrine of the possible 'internationalization' of contracts except in cases in which the parties, judge or arbitrator consciously and specifically refer to or apply public international law as such. No such conscious or specific reference or application is indicated by the mere fact that the judge or arbitrator fails to state the law he is applying or purports to apply the law of more than one country or substitutes broad statements, diffuse reasoning or generalities for judicial terseness and precision.

From this point of view it is necessary to express grave doubt about the significance and value of a number of awards which may be thought, but probably ought not, to be relevant to the present discussion. On many occasions arbitrators who were called upon to decide disputes arising from contracts between States and private persons have proceeded in a manner which may give rise to the impression that they applied public international law or at any rate the general principles of law which form part of it. Close analysis, however, proves that, except in the case of one not altogether satisfactory award, such an impression would be wrong; that in most cases the arbitrators applied a specific municipal law, but supported their conclusions by a process of comparison with other legal systems familiar to them, just as a municipal judge in England might test his views by referring to, say, Roman or New York law; that even where arbitrators did not in terms base their award on a certain system of municipal law they were not conscious of applying public international law or, indeed, any specific legal system at all; that, accordingly, their awards, while sometimes useful as studies in comparative law and, accordingly, indicative of the methods leading to the ascertainment of general principles, ought not to be treated or reported as if they were authorities on international law. International law would fall into disrepute and suffer great harm if every award on a dispute between a State and an alien came to be regarded as an example of 'internationalization' or as representative of the substance of public international law.

Thus no relevance, for present purposes, is to be attached to the *Alsing* case<sup>1</sup> which arose from contracts made in 1926 between the Greek Government and the Swedish Match Company or its associates and which in 1954 led to an award by M. Louis Python, then President of the Swiss Federal Tribunal. The contracts were held to be governed by Greek law.<sup>2</sup>

<sup>1</sup> Schwebel, 'The Alsing Case', *International and Comparative Law Quarterly*, 8 (1959), p. 320.

<sup>2</sup> pp. 326, 327. It is important to note that the Arbitrator recorded the parties' agreement (p. 327) that 'given the interdependence and the common source of the systems of law in force in Continental Europe, the question of the law to be applied is rather a question of principle without much practical significance'.

When, in the course of his reasoning, the Arbitrator referred to Swiss, French or German law, he did so merely in order to fill gaps in Greek law or to test or illustrate his results by a process of comparison.<sup>1</sup> <sup>2</sup>

A different tendency of arbitrators is exemplified by a case involving the Radio Corporation of America and China.<sup>3</sup> The Award does not purport to apply any specific legal system at all. Whatever authoritative value it may have in other respects,<sup>4</sup> it cannot be invoked as an example of 'internationalization' or as a contribution to the substance of public international law which the arbitrators did not profess to have had in mind and which is unlikely to have been applicable.<sup>5</sup>

A special case is the Award in the arbitration between *Lena Goldfields Ltd. and the Soviet Government*.<sup>6</sup> Article 89 of the Concession granted by the Soviet Union to the Claimants provided<sup>7</sup>

'The parties base their relations with regard to this Agreement on the principle of goodwill and good faith as well as on reasonable interpretation and the terms of the Agreement.'

It has been shown that Lord Asquith of Bishopstone regarded an astonishingly similar clause as importing a choice of public international law as the proper law of the contract,<sup>8</sup> and the same result could possibly have been reached in *Lena Goldfields* case. It could also have been held that the Concession was subject to Soviet law, and that the words quoted above expressed no more than a pious hope; this is in fact the view of Professor Nussbaum.<sup>9</sup> The Arbitrators, however, decided, in accordance with the applicants'

<sup>1</sup> It is difficult to see the significance of the case for any branch of the law except, possibly, comparative law. If it became a practice to afford space to the numerous awards made in private arbitrations and employing the comparative method, the existing facilities for publication would be wholly insufficient.

<sup>2</sup> The Award made in the arbitration between *Saudi Arabia and The Arabian American Oil Company* (above, p. 48) could be mentioned here, but since it has not yet been published, a discussion would be of little advantage to the reader. The case was not one relating to international law at all. References in the Award to the law in some European countries were clearly by way of illustration.

<sup>3</sup> *Radio Corporation of America v. The National Government of the Republic of China; Reports of International Arbitral Awards*, 1935, vol. 3, p. 1623.

<sup>4</sup> It is difficult to understand why it was thought helpful to report this case. It is even more difficult to understand why the report found its way into publications which are concerned with public international law.

<sup>5</sup> In the writings of international lawyers one sometimes finds a reference to the Award made in the case of *The Administration of Posts and Telegraphs of the Republic of Czechoslovakia v. Radio Corporation of America*; *American Journal of International Law* (1936), p. 523. The Agreement out of which this arbitration arose provided in Article 11 as follows: 'This Agreement, as to the obligations and responsibilities hereunder of the Corporation and the Administration respectively, shall be construed, interpreted and enforced according to the laws of the State of New York, U.S.A. and of the Republic of Czechoslovakia respectively.' The comment made in the preceding note applies with special force.

<sup>6</sup> Nussbaum, 'The Arbitration between the Lena Goldfields Ltd. and the Soviet Government', *Cornell Law Quarterly*, 36 (1950-1), p. 31, where the Award is printed in full. The extract in *Annual Digest*, 1929-30, Cases No. 1 and No. 258, is unfortunately insufficient.

<sup>7</sup> p. 50.

<sup>8</sup> Above, p. 52.

<sup>9</sup> p. 36.

submission, that Soviet law applied as to performance in the Soviet Union, but that in other respects the general principles of law prevailed.<sup>1</sup> It is doubtful whether any such scission which is justifiably criticized by Nussbaum was possible in law. It is still more doubtful whether in the circumstances of the case there was any warrant for it. However, if and in so far as reference was made to general principles, the award does throw some light upon certain aspects of public international law and indicates what internationalization of a contract can accomplish.<sup>2</sup>

### III

The commercialization of treaties as well as the internationalization of contracts are different aspects of the same fundamental idea. It is no longer attractive to suggest that public international law and private law respectively have fields of application, which are clearly and perhaps even inflexibly defined and which are determined by *a priori* or conceptualist reasoning, such as the formula that public international law is applicable only as between international persons or that relationships between international persons are necessarily subject to public international law. Both branches of the law are branches of the same tree. They apply in conformity with the demands of reasonable justice and practical convenience. They overlap and pervade each other. Both are called upon to contribute to the progressive evolution of the law. From this point of view the two doctrines advocated in this article (and any attack upon them) must in the last resort rest on arguments which are broad rather than narrow and which stem from substantive rather than formal grounds.

In adopting practical usefulness as one of the operative tests due regard should be had to the problem of the assignment of treaty rights<sup>3</sup> and of contractual rights. The assignment of such rights may occur *ex lege*, as in the case of the subrogation of a guarantor to the rights of the creditor whom he has paid, or it may be voluntary, as in the case of a contractual assignment of a debt or the endorsement of negotiable instruments. If treaty rights which are governed by public international law can be, and are, assigned to a private person, will they cease to be subject to public international law and become subject to some (undefined) system of municipal

<sup>1</sup> pp. 50, 51.

<sup>2</sup> Except in so far as the case is an example of internationalization and of the application of general principles, it is not an international case. See Lauterpacht, *Annual Digest*, 1929-30, p. 428. It is perhaps appropriate to refer here to the lectures which Professor Jessup published in 1956 under the title of *Transnational Law*. The term is not unattractive, but it must be doubted whether there is any advantage in advocating transnational law, unless the scope of its application and the method of ascertaining it are explained with precision. Only when this is done will it be possible to say whether and to what extent the idea of a 'transnational law' is in any way different from and superior to traditional legal conceptions.

<sup>3</sup> *This Year Book*, 30 (1953), p. 475.



law? If the rights of a private person, which arise from a contract with a State and are governed by a municipal system of law are assigned to a State, do they become subject to public international law? Perhaps it will not be seriously challenged that the answer to both questions should be in the negative. It may be that the traditional view would lead to the opposite results. If so, their appropriateness may have to be reviewed in the light of modern practices and requirements. On the other hand, it would go too far to submit, as Professor Sereni<sup>1</sup> does, that 'national law also applies to a situation, transaction and relationship if it is contemplated that the rights and duties arising thereunder may be transferred to entities which only have the status of subjects within national systems of law'. This view is intended to lead to the conclusion that the numerous bonds which international persons have issued to other international persons 'or order' are automatically subject to some municipal system of law (which Sereni does not define), merely because title may become vested in private persons. Such a solution would frequently be quite contrary to the parties' intention and hardly invites approval.

The critical reader should not, in conclusion, overlook the fact that the question whether public international or municipal law may, and is intended to, apply to a contractual arrangement has a counterpart in the sphere of domestic law, which in some respects may serve as an illuminating analogy. In many countries<sup>2</sup> there exists the necessity for distinguishing the governmental from the proprietary contract,<sup>3</sup> the *contrat administratif* from the *contrat commercial*,<sup>4</sup> the *öffentlichrechtliche Vertrag* from the *privatrechtliche Vertrag*.<sup>5</sup> Both types of contract may be subject to different rules. They may serve the same purposes and it may be open to the parties to make a choice. To the extent to which there exists interchangeability of legal rules in the municipal sphere, a corresponding conclusion put forward with a view to the international sphere would lose much of its novelty. The inquiry into the existence, validity and effect of the analogy will require a separate study.

<sup>1</sup> *Recueil des Cours*, 96 (1959), chapter ii, section 4.

<sup>2</sup> See in general, Mitchell, *The Contracts of Public Authorities* (London, 1954), containing a survey of English, American and French law; Langrod, 'Administrative Contracts', *American Journal of Comparative Law*, 4 (1955), 325. The problem of the administrative contract was discussed in the arbitration cases mentioned on pp. 48, 54, 55, nn. 1, 1, 5, above.

<sup>3</sup> Williston, *On Contracts*, vol. 9, section 195.

<sup>4</sup> Mitchell, *op. cit.*, pp. 164 et seq.

<sup>5</sup> Forsthoft, *Lehrbuch des Verwaltungsrechts* (7th ed., 1958), pp. 250 et seq.; as to Switzerland, see Imboden, *Der verwaltungsrechtliche Vertrag* (Basel, 1958).

# CONFLICTS OF LAWS IN TIME<sup>1</sup>

By J. K. GRODECKI

## I

THE primary function of private international law is to fix the limits of different municipal laws in respect to one another. It is thus concerned with the application of laws in space. Yet legal rules may collide on the plane of time as well as that of space. The impact of a change in the law within a legal district upon private international law has received scant attention from writers in this country.<sup>2</sup>

A conflict of law in time in the strict sense arises only in two cases: where there has been a change in the content of the private international law of the forum and where the change occurs in the domestic rule of the foreign legal system selected under the choice of law rule of the forum. They will be discussed in sections II and III respectively of the present article. The third case in which the time element appears significant, where there is an alteration in the localization of the connecting factor, falls more naturally within the legitimate function of private international law of determining the area of operation of a rule of law. The failure to exclude this last case (conveniently called by Bartin the *conflit mobile*<sup>3</sup>) from the conflicts of laws in time has been responsible for much of the confused thinking on this subject. A true conflict of laws in time arises 'not from the co-existence of laws but from their succession'.<sup>4</sup> To this it should be added that the succession of laws must take place within one legal system. In the *conflit mobile*, on the other hand, the court is dealing with a matter or dispute extending over several legal units. The change in the localization of the connecting factor from one country to another gives rise to a new problem of private international law. The factor of space overshadows that of time.<sup>5</sup> Thus, to take one example, according to English private international law the law governing the rights of spouses in each other's movables is the law of the country in which the husband is domiciled at the time of the marriage.<sup>6</sup> Should, however, the matrimonial domicil

<sup>1</sup> © J. K. Grodecki, 1960.

<sup>2</sup> The notable exception is the pioneering paper of Dr. F. A. Mann in this *Year Book*, 31 (1954), pp. 217-47.

<sup>3</sup> *Principes de droit international privé*, 1 (1930), p. 193.

<sup>4</sup> Roubier, *Les Conflits de lois dans le temps*, 1 (1929), p. 2. Roubier's brilliant analysis owes much to the writings of Savigny, and especially to that author's volume 8 (1849) of his *System des römischen Rechts*.

<sup>5</sup> The *conflit mobile* is of a hybrid kind. It is a conflict between two municipal laws successively applicable, each in operation in a separate legal unit. It can only arise in a very limited number of cases. See Mann, *op. cit.*, p. 222 and Gavalda, *Les Conflits dans le temps en droit international privé* (1955), p. 35.

<sup>6</sup> The factor of time is of course present in every case in which, regardless of any subsequent

subsequently change, a new question of choice of law arises. This question can be solved in a variety of ways<sup>1</sup> and the solution ultimately adopted is that which on balance of considerations of justice, convenience and others, including the element of time, appears to the legislators or judges as offering the greatest advantages. This search for the best law to determine the claims of the parties is typical of all questions of choice of law and is noticeably absent whenever a true case of conflict in time within the chosen law comes before the court.

## II

How far are the existing facts or relationships affected by the change in the content of the conflict rule of the forum? This problem can arise either when a statute alters a previous statutory or judge-made law or when a judicial decision reverses a previous judicial rule. Whilst in both cases the solution, it is suggested, must be found by reference to the transitional law of the forum, it is convenient to discuss the two cases separately.

### (1) *Conflict between successive statutory rules or between a statutory rule and a judicial rule*

Suppose that section 8 (1) of the Legitimacy Act, 1926, contained no transitional provisions. If such were the case, by reference to what law would the courts decide whether to give it a retrospective operation? This question would seem to admit of one possible answer. The conflict in time arises within the private international law of the forum and thus precedes the reference to a foreign substantive law. It would seem that it can only be settled by reference to the transitional rules of the forum. There is, moreover, every reason of convenience and justice why these rules should be the same as those applicable in a purely domestic case. Most legal systems adopt this line and there is little doubt that when the question presents itself before an English court, it will be answered in the same way. Judicial reliance on the *lex fori* in this context has not, however, been immune from criticisms founded on the peculiar nature of the conflictual rule, the concept of vested rights and the meaning of retroactivity.

A number of writers oppose the application of the general transitional law of the forum on the ground that the presumption against the retrospective operation of legislation which it contains is out of place where conflict rules are concerned.<sup>2</sup> Conflict rules are said to be indirect and, consequently, abstract and formal. There would seem, however, to be

change, the choice of law rule of the forum employs a connecting factor which involves not only localization but also determination of the relevant time.

<sup>1</sup> See Mann, *op. cit.*, p. 223.

<sup>2</sup> Thus Anzillotti, Ago and Szász. For a convenient statement of the various views with full references see Gavalda, *op. cit.*, and Rabel, *Conflict of Laws*, vol. 4 (1958), pp. 509-13.



little merit in exaggerating the importance of the difference in structure of the conflict rule to the point of finding in it the explanation of their supposed retroactivity. The conflict rule is of course indirect, its immediate object is not relations between individuals but the laws which govern such relations. It does not, however, follow from this that it is merely a formal or abstract technique which can be isolated from the rule of substantive law which it indicates. The two rules are inextricably connected; neither is able without the other to achieve the ultimate object of any rule of private law, the determination of the conflicting claims of the parties.

An unfortunate practical consequence of ascribing a formal character to conflict rules is their alleged inability to create any vested rights. Thus Dr. Mann writes that 'it is not easy to imagine circumstances in which an English court will hold that an English conflict rule is apt to confer a vested right of a substantive character, which requires and deserves protection against the implication of a new conflict rule. The primary function of the conflict rule is merely one of localization, i.e. of determining the *lex causae*.'<sup>1</sup> But if this suggestion were right, would not one expect a court to propound the principle of retroactive operation of new conflict rules? Yet, as has already been noticed, this is not the attitude of foreign courts and it is not likely to be the attitude of the English ones. In effect, it seems difficult to see why a right which is acquired as a result of the conjunction of the conflict rule of the forum with a substantive rule of the selected foreign law should be entitled to any less protection than a right directly conferred by the substantive rule of the forum. But the chief defect of this reasoning lies in its endeavour to define the rule of non-retroactivity in terms of the concept of vested rights, which itself lacks any agreed definition.<sup>2</sup> Such an endeavour has never succeeded. All statutes interfere to some extent with existing rights. The notion of vested rights is by itself of limited value for it tells

<sup>1</sup> Mann, *op. cit.*, p. 221. The indirect and supposedly abstract character of conflict rules prompts other writers to regard them as procedural and belonging to public law and, as such, retroactive. See Lepaulle, *Le Droit international privé* (1948), pp. 48 et seq. This in turn leads naturally to the extreme nationalistic approach in which private rights of individuals take second place.

<sup>2</sup> The example with which Dr. Mann seeks to support his statement, *op. cit.*, p. 221, does not, with respect, appear convincing and merely helps to demonstrate the unhelpfulness of the concept of vested rights. Is it proper to speak of the vested right of an infant to his continued illegitimacy? There is less objection to the use of the term in connexion with the natural parents, but even in this case it seems wrong to qualify as vested right a general quality or position giving them no precise remedies which could be asserted by action. The absence of provision for legitimation of natural children at common law cannot really be explained by reference to a supposed interest or right of either the natural parents or their children. Finally, section 8 of the Legitimacy Act, 1926, with its transitional provisions appears prospective rather than strictly retrospective. Without these provisions an English court might have given to this section a retrospective operation but, however unlikely such a construction, it would depend on normal English rules of statutory interpretation and not on the alleged inability of conflict rules to create rights entitled to protection. On the unhelpfulness of the doctrine of vested rights in conflict of laws generally see Carswell in *International and Comparative Law Quarterly*, 8 (1959), p. 268.

us nothing about the conditions of acquisition of these supposedly inviolable rights. As with all imperfect legal tools, whilst it may work reasonably well in practice, there is always the danger that on occasion it will be used incautiously with startling results. On the one hand, in some instances it has been made to justify quite unwarranted extensions of the presumption of non-retroactivity in the field of substantive law. On the other, it has served for some writers as a reason to exclude this presumption in the case of conflict rules. As the concept of vested rights thus often succeeds merely in confusing the issue, the legitimate area of operation of the principle of non-retroactivity must be ascertained by reference to other criteria. By far the most searching analysis of transitional law in general and non-retroactivity in particular is that of Roubier.<sup>1</sup> He accepts, what indeed is obvious, that new law cannot be solely prospective in its operation and distinguishes between what he calls the *effet immediat* of a statute and retroactivity proper. A statute is normally immediately applicable not only to facts and relationships posterior to its date but also to effects arising subsequently to its date of facts and relationships constituted before its coming into operation. It is this latter, albeit necessary and unobjectionable, operation of a statute which has often been lost sight of in consequence of an indiscriminate resort to the notion of vested rights. Furthermore, in Roubier's conception there is no room for the differential treatment of conflict rules.<sup>2</sup>

## (2) *Conflict between successive judicial rules*

So far in this discussion it has been assumed that the new conflict rule of the forum is in statutory form and alters a previous statutory or judge-made rule. No reference has been made to the special problem raised by a conflict in time between successive judicial decisions. For continental writers this problem hardly exists. As single judicial decisions do not make law it is impossible to state with precision the exact moment of change and, in consequence, new judge-made rules are applied retrospectively. The position in English law is at first sight quite different and yet it is clear enough that the courts feel no qualms about giving retrospective operation to new substantive rules and one cannot expect them to treat conflict rules

<sup>1</sup> Op. cit.

<sup>2</sup> No comparable study exists in this country. Books on the interpretation of statutes merely contain a string of judicial quotations or propositions founded on them, some aiming at maximum precision, others careless in the extreme. This is obviously a field where much work requires to be done. Maugham J. in *Gardner and Co. v. Cone*, [1928] Ch. 955, at p. 966 remarked that the word 'retrospective' is used in several different senses and that this leads to a good deal of confusion. Dr. Mann writes that in this country the word is used sometimes in a wide and sometimes in a narrow sense, op. cit., p. 219: 'In a wide sense, a statute is retrospective if, as from the date of its coming into force it makes changes in the legal evaluation of facts which already are and continue to be in existence.' The great merit of Roubier's terminology is to dispense in this case with the word 'retrospective' altogether.

differently.<sup>1</sup> The explanation must be sought in the theory of judge-made law. The overruling of a precedent, unlike the repeal of a statute, has retrospective operation because no established rule of law is thereby abolished. 'It is an authoritative denial that the supposed rule of law has ever existed.'<sup>2</sup> Whilst there is an element of fiction about this explanation of judicial law-making, it is beyond all question that it is and has been for centuries accepted by the courts. What also makes it less imperative to have a principle of non-retroactivity of new judge-made rules is that any claim that the present practice works injustice must be viewed in relation to the occasional doubts about the content and even existence of such rules.

In the realm of private international law the question makes its appearance in connexion with recognition of foreign decrees of divorce. Suppose that a person obtains a decree of divorce in a State in which he is not domiciled at the time, but which the courts of his domicile would recognize, and subsequently remarries. Would an English court 'hold the remarriage invalid if the decree were granted before the date of the decision in *Armitage v. A.-G.*<sup>3</sup> and valid if afterwards'?<sup>4</sup> In all probability the remarriage would be regarded as valid in both cases<sup>5</sup> and the traditional theory of case law makes very good sense here. It may well be true in fact, as well as in theory, that *Armitage's* case did not alter the law but merely declared a rule of law where no articulate rule existed.<sup>6</sup>

Conflicts of laws in time also arise under the doctrine of *Travers v. Holley*.<sup>7</sup> It is stated in Dicey that 'the material time at which the similarity—[between the relevant English statute and the statute which confers jurisdiction on the foreign court]—must exist is the time when the foreign divorce proceedings are instituted. Therefore, if the foreign divorce in *Travers v. Holley* had been obtained before 1937 (when domicile was the only basis on which English courts exercised divorce jurisdiction), the

<sup>1</sup> Dr. Mann writes, *op. cit.*, p. 220, n. 10, that the question 'is entirely unsettled'. In effect, there are no conflict cases directly in point and little discussion of the problem.

<sup>2</sup> Salmond, *Law Quarterly Review*, 16 (1900), pp. 376, 384. This retroactive operation is so vigorous that it affects actions already commenced and destroys orders already made though not perfected. See *Re Harrison*, [1955] Ch. 260. Jenkins L.J. (as he then was) said, *ibid.*, at p. 283, that the new decision 'merely declared the law as it always existed, and showed it to have been theretofore misapprehended in the courts below'.

<sup>3</sup> [1906] P. 135.

<sup>4</sup> The question is asked by Webb, *International and Comparative Law Quarterly*, 7 (1958), p. 374.

<sup>5</sup> See Webb, *ibid.*, who takes the same view. But his subsequent reference in a similar context to the authority of *Lynch v. Provisional Government of Paraguay* (1871), L.R. 2 P. & D. 268 and *Re Aganoor's Trusts* (1895), 64 L.J. Ch. 521, seems erroneous as both these cases concerned the different problem of the change in the statutory provisions of the foreign law chosen by the English conflict rule to determine the dispute. See below, pp. 66 and 69.

<sup>6</sup> It is in fact impossible to be certain that had the facts of *Armitage v. A.-G.* come before a court at an earlier date the decision would not have been the same. Even today there exist doubts as to the scope of its *ratio*. See the remarks of Davies J. in *Mountbatten v. Mountbatten*, [1959] P. 43, 76-78.

<sup>7</sup> [1953] P. 246.



divorce would not have been recognised in England.<sup>1</sup> This statement can only be reconciled with the attitude of the courts towards case law by reading into the *ratio* of *Travers v. Holley* a number of specific transitional provisions. Since retroactivity is implicit in judge-made rules, the presumption must be the other way round. The only authority for the proposition in Dicey is to be found in some remarks of Hodson L.J. in *Travers v. Holley*,<sup>2</sup> the force of which is, however, weakened by the fact that in that case, at the material time when the New South Wales proceedings were instituted, the Matrimonial Causes Act, 1937, was in fact in force and section 13 (now section 18 (1) (a) of the Matrimonial Causes Act, 1950) of this Act corresponded closely with the provision under which the New South Wales Court claimed jurisdiction. In the later case of *Arnold v. Arnold*<sup>3</sup> there was no such close similarity between the statutory provisions of the Finnish law and section 18 (1) (a) of the Act of 1950 and this may explain why Mr. Commissioner Latey to a large extent based his decision on the wife's residence in Finland for a period which would have sufficed, had the residence been in England, to found the jurisdiction of an English court under section 18 (1) (b). The outcome was recognition of the Finnish decree notwithstanding that it had been granted in 1940, that is nine years before the coming into effect of the Law Reform (Miscellaneous Provisions) Act, 1949, which is repeated in section 18 (1) (b) of the Act of 1950. From this it would appear that, contrary to the suggestion in Dicey, the material time at which the statutory similarity must exist is the time of the institution of the English proceedings.<sup>4</sup> It is believed that this is a better statement of the law. None of the Acts deal with the recognition of foreign decrees; they deal solely with the jurisdiction of English courts. Thus their impact upon judicial practice in the realm of recognition could not be ascertained until the decision of *Travers v. Holley* in 1953. Admittedly, that decision could not possibly have come about had the Acts not been passed. But does this necessarily lead to the conclusion that a judicial rule modelled on the analogy of a statute shares with that statute its non-retroactive character? There would seem no warrant for such a finding with its logical corollary, that in order to obtain recognition in this country, the foreign decree must have been made since 1953. If in fact the Acts had been concerned with recognition, a conflict would have arisen between the judicial rule and the new statutory rule and, subject to any special transitional provisions in the Acts, the Finnish decree in *Arnold* could not have been recognized. This result would be so inconvenient as to force the

<sup>1</sup> *Conflict of Laws* (7th ed., 1958), p. 322.

<sup>2</sup> Above, n. 7, at p. 62.

<sup>3</sup> [1957] P. 237 and see the remarks of Karminski J. in *Robinson-Scott v. Robinson-Scott*, [1957] 3 W.L.R. 842, at p. 849. See, however, Dicey, op. cit., p. 324, illustration 10.

<sup>4</sup> Kennedy, *Canadian Bar Review*, 32 (1954), p. 359, and Korah, *Modern Law Review*, 20 (1957), p. 278. Professor Kennedy's appeal to public policy in this connexion seems misplaced.

conclusion that in such an event the Acts would have indubitably been made, in some measure at any rate, retrospective.<sup>1</sup>

### III

A change in the substantive law of the foreign country selected by the conflict rule of the forum could be met by the court in one of three theoretically possible ways. It could refuse to take any account of the change, or resort to its own rules of statutory interpretation or, finally, leave the issue to the transitional law of the *lex causae*. The first and second solutions have little attraction and cannot be maintained except on the assumption that any foreign retrospective legislation as such, regardless of its content, offends the public policy of the forum. Today, however, when retroactivity of statutes appears as a perfectly legitimate legislative technique employed in all countries, such an assumption cannot be made. It is thus the third solution which finds favour with the writers and the courts in most countries<sup>2</sup> as the most convenient, rational and in greatest harmony with the tenets of private international law. It is believed that in this country the position is the same and that an English court includes in its reference to the law of a foreign country the rules of statutory interpretation in existence in that country. The contrary, however, is often asserted on the authority of the cases of *Lynch v. Provisional Government of Paraguay*<sup>3</sup> and *Re Aganoor's Trusts*<sup>4</sup> which are interpreted as having decided that the testamentary succession to movables is governed exclusively by the *lex domicilii* of the deceased as it stood at the time of his death, disregarding any subsequent changes. These cases are more fully dealt with later<sup>5</sup> and it suffices to say at present that whenever an English conflict rule employs a connecting factor which involves not only localization but in addition fixes the relevant time, it does so with reference to this connecting factor and not with reference to the selected foreign law. It has recently been suggested<sup>6</sup> that choice of law rules are three-dimensional, containing: 'the directional dimension' (pointing to a foreign law), 'the temporal dimension' (pointing to the time at which reference to that law is to be made) and 'the penetral dimension' (indicating whether or not reference is to the whole of that law including its conflict rules). It is submitted that in such an approach there is the danger that the nature and purpose of private international law will be lost sight of. A choice of law rule is basically directional; it determines which of the simultaneously existing

<sup>1</sup> In *Keyes v. Keyes*, [1921] P. 204 the retroactive operation of the new judge-made conflict rule was taken for granted despite considerable hardship thereby caused. Remedial legislation followed at once.

<sup>2</sup> For a comprehensive survey see Gavalda, *op. cit.*, pp. 285 et seq.

<sup>3</sup> Above, p. 62, n. 5.

<sup>4</sup> Above, p. 62, n. 5.

<sup>5</sup> Below, pp. 66 and 69.

<sup>6</sup> By Mendes da Costa in *International and Comparative Law Quarterly*, 7 (1958), p. 217, and see below, p. 73.

legal systems is best-suited to govern a given set of facts. Whilst the controversy as to the scope of the doctrine of *renvoi* makes it possible to speak of 'a penetral dimension', a choice of law rule has no 'temporal dimension'. This becomes apparent when one reflects on what is meant by the word 'law' in a choice of law rule. It can only mean the law which, according to the expert evidence, the courts of the foreign country in question would apply to the same set of facts at the time of reference. The reference is to current law and it must include the temporal limits which that law sets to its operation and which are part of it. Otherwise the foreign law selected under the conflict rule of the forum would not in effect be applied. To apply non-existent foreign law is to deprive private international law of much of its meaning. This, it is believed, an English court is not allowed to do.<sup>1</sup>

In the present context there is a certain affinity between conflicts of laws in time and the doctrine of *renvoi*.<sup>2</sup> This affinity is, however, more apparent than real. Whilst *renvoi* always involves questions of private international law, conflicts of laws in time primarily concern municipal law. The application of the transitional law of the *lex causae* does not signify, to borrow from Dr. Cheshire's criticism of *renvoi*, 'the virtual capitulation of the English rules for the choice of law'.<sup>3</sup> There is here no remission to another legal system to solve the issue, no danger of complications of further remissions. None of the weighty reasons which are invoked to justify either the complete rejection of the doctrine of *renvoi* or its acceptance only in certain fields seem in point. It is, therefore, all the more remarkable for any legal system to accept *renvoi* and to refuse to take account of foreign transitional provisions. If, contrary to the writer's belief, the traditional interpretation of the *Lynch* and *Aganoor* cases is sound, this surprising position would appear to be adopted in England, at any rate in matters of succession where *renvoi* or the foreign court theory is firmly established. Recently an interesting

<sup>1</sup> Whilst it is convenient to treat foreign law as a fact this does not warrant regarding it as being composed of isolated rules having intrinsic value of their own, not embodied and co-ordinated in a legal system. It does not follow that because the forum does not apply foreign law directly but merely patterns its own rule after the foreign rule, the forum is free to arrest the development of the foreign law at any point of time and arbitrarily to disregard foreign transitional provisions. In the recent case of *Adams v. National Bank of Greece and Athens, S.A.*, [1959] 2 W.L.R. 800 Morris L.J., reading the judgment of the Court of Appeal, emphasized (at p. 806) that if the claims of the plaintiffs had been put forward against the defendant bank in the Greek courts they would have failed. At p. 810 he pointed out: 'It does not seem to us that an English court could any more refuse to recognise the fact of a change in Greek law than it could refuse to pay attention to any other relevant fact.'

<sup>2</sup> Some writers on the Continent have seized upon it. For Szászy this similarity provides a theoretical platform for arguing that the word 'law' in a choice of law rule means the substantive part of that law alone. For him the foreign conflict rules and the foreign transitional rules must alike be disregarded: *Recueil des Cours*, 47 (1934), p. 116. Niboyet, on the other hand, argues that the foreign law which is chosen by the forum can alone determine its contents at the same time as its sphere of operation, whether in time or in space: *Revue de droit international et de législation comparée*, 59 (1928), p. 713. <sup>3</sup> *Private International Law* (5th ed., 1957), p. 70.



suggestion has been put forward,<sup>1</sup> that the foreign court approach is fundamental in all classes of case in English private international law, and that whenever an issue arises to be decided according to the law of a foreign country, the English courts must apply to that issue whatever law the foreign court would apply. Perhaps the evidence adduced is not strong enough to warrant such a generalization.<sup>2</sup> However this may be, it is immaterial as far as conflicts of laws in time are concerned whether or not the word 'law' in a choice of law rule includes foreign conflict rules since the transitional rules of a country are part of its domestic substantive law. The word 'law' must at least mean a rule of decision which would be applied by the foreign court to a purely domestic group of facts. Resort to foreign transitional provisions appears simply as part of the process of applying the foreign law. A retrospective rule of the foreign law, just as any other of its rules, loses its claim to recognition only if its content and consequences offend the public policy of the forum. It is submitted that these conclusions are supported by an examination of the relevant English decisions which are, however, not altogether satisfactory because in a number of them the problem of conflict of laws in time was either barely perceived or its essential unity was not appreciated and consequently all the relevant authorities were not cited to the court. The cases cover a wide field and for reasons of convenience are discussed under the following five headings: (1) validity of wills and intestacy; (2) delictual liability; (3) validity of marriages; (4) adoption; and (5) discharge of contracts.

(1) *Validity of wills and intestacy.*

*Lynch v. Provisional Government of Paraguay.*<sup>3</sup> In *Lynch v. Provisional Government of Paraguay* Francisco Solano Lopez, a dictator of Paraguay, died domiciled in Paraguay on 1 March 1870 leaving personal property in England which he had willed to his mistress, Mme Lynch. After his death, but before a grant of probate was made in England, a decree of the revolutionary régime which replaced that of Lopez declared that all the property of the deceased, wherever situate, was the property of the nation of Paraguay and that no will or testament of Lopez was entitled to probate or had any validity whatsoever. These facts are obviously very special and provide an unsteady platform for any general legal doctrine. That the case has been subjected to so many interpretations is no doubt in some measure due to the fact that Lord Penzance, in refusing to recognize the decree, insisted on regarding it as a perfectly ordinary law of succession.

<sup>1</sup> By Inglis in *Law Quarterly Review*, 74 (1958), p. 493.

<sup>2</sup> In problems of *renvoi* and those of the incidental question there is something to be said for greater flexibility and for individual treatment of the choice of law rules. See Gotlieb's interesting paper on the incidental question *Canadian Bar Review*, 33 (1955), p. 523.

<sup>3</sup> Above, p. 62, n. 5.

His judgment provides the foundation for four different propositions.<sup>1</sup>

(1) The widest proposition is that in all classes of case the English court applies foreign law as it exists at the date defined by the *lex fori* and disregards all later changes.<sup>2</sup> This alleged rule, which in effect means that an English court never applies foreign retrospective statutes, is inconsistent with several decisions of the House of Lords<sup>3</sup> besides being quite inadmissible in theory.

(2) In the narrower interpretation the *ratio* of *Lynch's* case is restricted to cases involving succession to movables. This construction is consonant with the general tenor of the judgment and is to be found in most text-books. But there are many reasons which make it unacceptable. Lord Penzance justified his reading of the rule that succession to movables is governed by the law of domicile as it existed at the date of the testator's death by citing passages from Story adding that 'the words "at the time of his death" are here carefully inserted as part of the principal proposition, and a long list of authorities is cited in support of that proposition, in none of which is any passage to be found indicating that those words are not a necessary part of it'.<sup>4</sup> But it would seem beyond all question that, like other writers of his day, Story inserted those words with reference to domicile, not to law. The problem of retroactivity of *lex successionis* did not enter his mind. The entirely new rule thus propounded provides an odd contrast to cases decided before 1870 in which the courts adhered to the doctrine of *renvoi* in succession matters. The decision is all the more regrettable as the formulation of this new rule was not called for by the facts before the court. The decree of the Provisional Government confiscated the English property of Lopez two months after his death as a measure of posthumous punishment.<sup>5</sup> It was not merely discriminatory and as such contrary to English public policy, it was penal. For an English

<sup>1</sup> Lord Penzance was also concerned with the injustice of retrospective legislation generally. Undoubtedly the presumption against retrospective legislation must have been much stronger in 1870 than it is today, but the wisdom of such legislation is a proper subject of inquiry for municipal rather than international law. It should be remembered that the intrinsic merits or demerits of the substantive foreign law were not taken into account when the conflict rule of the forum selected that law as most appropriate to determine the claims of the parties.

<sup>2</sup> Thus Gavalda op. cit., pp. 288 and 392 and Lewald, *Règles générales des conflits de lois* (1942), pp. 112 et seq., cited by Mann, op. cit., p. 233 n.

<sup>3</sup> *Starkowski v. A.-G.*, [1954] A.C. 155. *R. v. International Trustee for the Protection of Bondholders A.G.*, [1934] A.C. 500; *Kahler v. Midland Bank*, [1950] A.C. 24.

<sup>4</sup> Above, p. 62, n. 5. Lord Penzance's judgment provides a good example of mechanical jurisprudence. A new rule of law was declared by making an old rule do work for which it was not designed and without any consideration of the different problems involved. The passage in Story, which immediately follows that quoted by Lord Penzance, shows that the author was merely concerned to establish domicile *at death* as the right connecting factor as opposed to any other domicils the testator may have had during his life: *Commentaries on the Conflicts of Laws* (2nd ed., London, 1841), s. 481. His account is unchanged in the 6th Boston edition (1865).

<sup>5</sup> Lopez was accused of innumerable crimes against the State. The decree was in fact a *privilegium*, in its objects not unlike an act of attainder.

court to apply it would have been tantamount to applying the criminal laws of a foreign State. Had Lord Penzance based his decision on this ground it would have been unexceptionable.<sup>1</sup>

(3) According to the third proposition the authority of the case should be further confined to the purely formal matter of the grant of probate or administration.<sup>2</sup> It is submitted that, unless the case can be discounted on the ground that it concerned a penal decree and thus shorn of all significance in the field of conflicts of laws in time, this proposition has much to commend it. The admitted reason why Lord Penzance paid no attention to the penal character of the decree was the formal nature of the jurisdiction of his Court. The authority of his decision must, it is suggested, be similarly circumscribed.<sup>3</sup>

(4) An entirely novel interpretation of *Lynch* was put forward by Diplock J. in the recent case of *Adams v. National Bank of Greece and Athens, S.A.*<sup>4</sup> The learned judge thought that the real reason why Lord Penzance rejected the subsequent decree was that it regulated the rights of persons who were already successors. Such a measure was not a law of succession and 'the English courts recognise as affecting movable property locally situate in England only the law of succession of the country of domicile of the deceased'.<sup>5</sup>

However attractive Diplock J.'s suggestion may appear, it is respectfully submitted that it does not receive support from either the judgment or the facts in *Lynch's* case. On the one hand, Lord Penzance undeniably dealt with the Paraguayan decree as a law of succession. On the other hand, the decree was not merely one regulating 'the rights of persons who are already

<sup>1</sup> See *Banco de Vizcaya v. Don Alfonso de Borbón y Austria*, [1935] 1 K.B. 140. See also Dicey, op. cit., p. 611 and Mann, op. cit., p. 242.

<sup>2</sup> See the remarks of Lord Cohen in *Starkowski v. A.-G.*, above, p. 67, n. 3, at p. 180 and Diplock J. in *Adams v. National Bank of Greece and Athens, S.A.*, [1958] 2 Q.B. 59 at p. 76.

<sup>3</sup> Lord Penzance expressly left this aspect of the facts before him for the court entitled to adjudicate upon the property of the deceased. There is, however, some artificiality in accepting this view of the judgment as on both occasions the court is referred to the law of the country in which the deceased was domiciled at the time of his death. Can it be said that the grant of probate raises peculiar issues in regard to retroactivity? One would think not, although this may be the meaning of the somewhat cryptic remarks of Lord Cohen in *Starkowski v. A.-G.*, above, n. 2.

<sup>4</sup> Above, p. 68, n. 2. The Court of Appeal, above, p. 65, n. 1, reiterated the traditional explanation of *Lynch's* case without referring to Diplock J.'s comments thereon.

<sup>5</sup> *Ibid.*, at p. 76. On the view that the learned judge took of the issue before him *Lynch* was not relevant. Quite apart from the fact that the amalgamation of two companies by a governmental decree has little in common with the devolution of an estate upon death, Diplock J. adopted what he called the historical approach and disregarded the subsequent Greek legislation, not on the ground that it was retrospective, but on the ground that it was in substance a law relating to the discharge of liabilities and thus, on the facts before him, fell within the sphere allocated by the English conflict rules to English substantive law. Had the learned judge approached the matter *de novo* and asked if there was in the case of this particular contract a debtor with assets in this country, the reference to Greek law with its transitional rules would have been imperative since the existence of such debtor was entirely dependent on Greek law. This line was adopted by the Court of Appeal, above, p. 65, n. 1, and see below, p. 81, n. 3. For a comment approving Diplock J.'s approach see Keenan, *Modern Law Review*, 22 (1959), p. 556.



successors' but was also distinctly penal and discriminatory. In reality, Diplock J. was not concerned with retroactivity but with the elaboration of yet another restriction to the province allocated by the English conflict rule to the foreign *lex successionis* where movable property is in England. His words thus bear witness to the overriding authority of the *lex situs* when it coincides with the *lex fori*,<sup>1</sup> but in so far as they relate to succession they appear at odds with the decision of the Court of Appeal in *In the Estate of Maldonado*,<sup>2</sup> where it was left to the *lex successionis* to determine whether or not some of its laws were to be classified as pertaining to succession. This problem of classification falls outside the scope of this article.<sup>3</sup> What is, however, significant is Diplock J.'s departure from the traditional explanation of *Lynch's* case and the substitution for it of an interpretation in which that case ceases to throw any light on the attitude of English courts towards foreign retrospective legislation.

*Re Aganoor's Trusts*.<sup>4</sup> In the later case of *Re Aganoor's Trusts* Romer J. in a very brief judgment endorsed the reasoning of Lord Penzance in *Lynch's* case. The testatrix died in 1868 domiciled at Padua. She created a settlement ('a substitutionary trust') by her will which was valid by Austrian law then in force in Padua. In 1871 the Italian Civil Code came into operation under which settlements of this kind were dissolved from the day the new code came into force and the property divided between a number of beneficiaries. Romer J. declined to take cognisance of the new legislation and its transitional provisions on the ground that 'the English law adopts the law of the domicile in a case like this, as it stood at the time of the testator's death, and does not take account of any subsequent change though retrospective'.

It is believed that the learned judge erred in not applying the foreign *lex causae* to which he was referred by the English conflict rule. The facts before him were very different from those which faced Lord Penzance. There was no question of either the new law being penal and discriminatory or the Court's jurisdiction formal. Nor did the new law appear retrospective in the strict sense.<sup>5</sup> The settlement was at the beginning governed by the

<sup>1</sup> See for another example of this tendency the passage in the judgment of Devlin J. in *Bank voor Handel en Scheepvaart N.V. v. Slatford*, [1953] 1 Q.B. 248, at pp. 257-60. And see to the same effect Diplock J., above, p. 68, n. 2, at p. 73. See also Goodrich, *Handbook on the Conflict of Laws* (3rd ed., 1949), p. 505.

<sup>2</sup> [1954] p. 223.

<sup>3</sup> One must wonder whether any alleged gains to the *forum* resulting from the reduction of the scope of the *lex successionis* are sufficient to compensate for the ensuing loss of the uniformity of distribution of the estate. The interests of the forum seem sufficiently well protected by the doctrine of public policy. Neither in France nor in Germany did the courts refuse to take note of Soviet legislation retrospectively abolishing private rights of succession on the ground that it was not a law of succession. Whilst German courts fully applied it, French courts justified their refusal to do so on the grounds of *ordre public*. It is difficult, however, to argue that retrospective laws of succession must always be objectionable. Each case should be considered on its merits.

<sup>4</sup> Above, p. 62, n. 5.

<sup>5</sup> Cf. Mann, op. cit., p. 234. Diplock J. in *Adams v. National Bank of Greece and Athens, S.A.*,

old law and in 1871 it fell under the control of the new law. One would have thought that a settlement created by will, like a settlement *inter vivos*, was subject throughout its existence to its governing law.

*In the Estate of Musurus.*<sup>1</sup> The two remaining cases concerning succession shed little light on the attitude of English courts towards foreign transitional law. In *Musurus'* case the Turkish Government claimed as *bona vacantia* the property situate in England of a domiciled Turkish woman who died in 1915. Under the law of Turkey in existence in 1915 the State claimed by *jus regale* and not as *ultimus heres*. At the time of the action the new Turkish law (based on the Swiss Code) under which the State takes as *ultimus heres*, was in force. It was conceded that the law to be applied was the old Turkish law but the report contains no information as to whether this was done by reference to English conflict rules or to the transitional provisions of the new Turkish code.

*In the Estate of Pikelný.*<sup>2</sup> The tragic facts of *In the Estate of Pikelný* appear at first sight to give rise to an unusual problem of conflicts of laws in time. The Court was moved for an order to presume the death of one Feivel Pikelný who was domiciled in Lithuania and was last seen there on 28 October 1941 among a group of 10,000 Jews about to be machine-gunned by the German police. The application for a grant of letters of administration to Pikelný's estate in England was on behalf of his next of kin. According to the English conflict rule where a person has died domiciled abroad the grant should be made to persons entitled under the law of the country in which the deceased was domiciled at the time of his death. The law of the Republic of Lithuania was replaced by that of the Soviet Union after the invasion and annexation of 1940. By that law the property of Pikelný would belong to the State. German occupation decrees followed and it might be said that in 1941 Lithuanian law was the law of the German decrees. Karminski J., however, held that the English court would not recognize as law of Lithuania decrees made by an enemy invader. Neither would the learned judge take cognisance of Soviet legislation since the new status of Lithuania was not recognized by the United Kingdom until February 1947 or thereabouts. Consequently he gave leave to swear the presumed death of Pikelný on 18 October 1941, and granted administration to persons who were the next of kin according to the law of the Lithuanian Republic.

Although Karminski J. did not expressly say so, he must have rejected the claim of Soviet law as the law in operation in Lithuania in 1941 on the

above, p. 68, n. 2, mentions *Aganoor's* case without any comment. The plaintiffs in the present case could not be regarded as 'already successors' since their interest would only vest if and when the life tenant ('person entitled to the usufruct of the settled property') died without children and he was still alive in 1871.

<sup>1</sup> [1936] 2 All E.R. 1666.

<sup>2</sup> Reported only in *The Times* newspaper, 30 June and 1 July 1955, and in [1955] C.L.Y. 1053.

ground that it emanated from a usurping Government and was thus on a par with the German occupation decrees.<sup>1</sup> This was the only possible conclusion unless the doctrine of retroactivity of recognition, to which allusion was made by counsel,<sup>2</sup> could be said to dictate a different one. When a change of sovereignty over a territory takes place the problem of conflict of laws in time ceases to be one of private law alone and the fact that a judge sitting in Lithuania in 1955 would apply Soviet law to events occurring in that country in 1941 is not solely decisive. Although Karminski J. spoke of the recognition of the present Lithuanian Government, what in effect occurred in 1947 was recognition of the incorporation of the territory of the old Lithuanian Republic into the U.S.S.R.<sup>3</sup> There is no rule of international law that recognition of territorial changes brought about by coercive means is retroactive. Such a recognition is not a declaratory confirmation of rights acquired through the operation of law but is constitutive of such rights. None of the reasons which explain and justify the principle of retroactivity of recognition of States or Governments is here present and, with respect, Karminski J. was right in not adopting it in the case before him.<sup>4</sup>

## (2) *Delictual liability*

*Phillips v. Eyre*.<sup>5</sup> In this case an action was brought in England against the defendant, an ex-Governor of Jamaica, for having assaulted and falsely imprisoned the plaintiff during a rebellion on the island. The defendant's acts were illegal by the law of Jamaica 'as it stood at the time' of the tort but were subsequently legalized and divested of their tortious character by

<sup>1</sup> T. C. Chen, *The International Law of Recognition* (1951), p. 432 writes: 'The conquest of a territory which is unconfirmed is precisely equivalent to a case of belligerent occupation extended into the time of peace.'

<sup>2</sup> Lyons in this *Year Book*, 32 (1955-6), p. 288 appears to criticize the decision on the ground that in fact the law 'as it stood' in Lithuania in 1941 was Soviet law and relies on *Lynch's* case to show that any inquiry into retroactivity of recognition was superfluous. No such inquiry was, however, made by the Court. It was German law that 'in fact' was in operation. That sometime in 1940 Lithuania was supposed to have applied for admission to U.S.S.R. is not conclusive as far as an English court is concerned. Furthermore, it is difficult to see what is the relevance of *Lynch's* case to the facts before the Court as, on such an argument, Soviet law was the law of Lithuania already in 1941 and there was no subsequent change.

<sup>3</sup> See the statement of Mr. McNeil in the House of Commons on 10 February 1947 on which the learned judge relied: 433 H.C. Deb. 5 s., 5.

<sup>4</sup> The decision of the New Brunswick Admiralty Court in *The Elise*, [1948] C. Ex. R. 435 is, it is believed, wrong. It was there held that recognition of the new *status quo* in Estonia related back not merely to the reoccupation of Estonia by the Soviet army in 1944 but to the original establishment of the Soviet sway over that country. See also *A/S Tallina Laevauhisus v. Estonian State S.S. Line* (1957), 80 Ll. L. Rep. 99 where the Foreign Office stated in its certificate that the effects of such recognition and, in particular, the date to which it should be deemed to relate back were questions for the court to decide. If, however, the right view were that the principle of retroactivity of recognition applies to recognition of territorial changes, then, on the facts in *Pikelny's* case, a conflict of laws in time would have arisen and Soviet law with its transitional provisions would be applicable, subject only to the doctrine of public policy.

<sup>5</sup> (1869), L.R. 4 Q.B. 225; (1870), L.R. 6 Q.B. 1.



an Act of Indemnity. Cockburn C.J. gave judgment for the defendant holding strongly that the Court was bound in comity, notwithstanding the manifest injustice involved, to apply the foreign *lex causae* fully, including later retrospective changes. The Exchequer Chamber affirmed the decision which, as an authority on the attitude of English courts towards foreign retrospective legislation, is thus the complete reverse of *Lynch v. Provisional Government of Paraguay*.<sup>1</sup> No doubt, in so far as *Phillips v. Eyre* concerned a British colony, it may be said to be a special case but so, albeit in a different way, is *Lynch's* case.

### (3) *Validity of marriages*

*Starkowski v. A.-G.*<sup>2</sup> The decision of the House of Lords in *Starkowski v. A.-G.*, affirming the decisions of the Court of Appeal and the High Court, is of the greatest significance as a complete departure from the judicial tradition associated with the cases of *Lynch* and *Aganoor*. The facts of the case are well known and need only be restated in a summary form. In May 1945 H and W, both domiciled in Poland married in a Roman Catholic church in Austria without a civil ceremony as required by the law in operation in Austria at the time of the ceremony. In June 1945, a new law was passed in Austria making retroactive provisions for the validation of religious marriages by registration. The marriage between H and W was registered in 1949. W came to England in 1946<sup>3</sup> and formed a connexion with X, by whom she had a child, the petitioner, born in 1949. In 1950 W and X went through a ceremony of marriage in England. The question was whether the ceremony of 1950 was a valid marriage and legitimated

<sup>1</sup> Above, p. 62, n. 5. *Phillips v. Eyre* was not referred to in *Lynch's* case.

<sup>2</sup> Above, p. 67, n. 3.

<sup>3</sup> An argument for the petitioner to which much attention was devoted was that after W obtained a domicile in England her status could not be affected by Austrian law. In this aspect of the case much reliance was placed on the decision of the Court of Appeal in *Re Luck's Settlement Trusts*, [1940] Ch. 864. Admittedly, the explanation of this decision must in part be sought in the Court's reluctance to recognize the retrospective effect of the foreign legitimation to the date of the child's birth, at which time he was domiciled in England. But the case did not involve a true conflict of laws in time. There was no change in the substantive law of the foreign country to which the English connecting factor referred. The conflict (not unlike a *conflict mobile*) was between two municipal laws successively applicable, each in operation in a different country. The determination of their respective provinces was a novel question of private international law which the Court ought to have faced instead of evading. An attractive approach suggested by Professor Graveson, *Conflict of Laws* (3rd ed., 1955), p. 171, is to regard the retroactivity of the foreign legitimation for the purpose of taking under an English settlement as an incident of status, which incident an English court is entitled to refuse to recognize, especially if to do otherwise could lead to English property being tied up for a period longer than that sanctioned by the Rule against Perpetuities. See Gray, *The Rule against Perpetuities* (4th ed., 1942), pp. 290-2. By contrast in *Starkowski's* case, once the Court decided that the specific conflict rule submitting the formalities of marriage to the *lex loci celebrationis* provided an overriding exception to the general principle that status is governed by personal law, the only question remaining in dispute was whether reference to the foreign *lex loci celebrationis* included a reference to its transitional provisions.

the petitioner. In all three instances the courts unanimously answered this question in the negative, holding the Austrian marriage to have been properly validated. Austrian law was thus not applied 'as it stood at the time' of the Austrian marriage. The true principle of the case is well stated, by Lord Reid: 'Once it is settled that the formal validity of a marriage is to be determined by reference to the law of the place of celebration, there is no compelling reason why the reference should not be to that law as it is when the question arises for decision.'<sup>1</sup> It is believed that this principle is of general import for all cases involving a change in the content of the substantive rules of the foreign law selected by the English choice of law rule and that *Starkowski's* case must be taken to have overruled such authority as has sometimes been ascribed to *Lynch's* case in this field.<sup>2</sup> The decision of the House of Lords cannot be explained, as has been suggested,<sup>3</sup> on the narrow ground that the choice of law rule in question has a second dimension which provides for the reference to the *lex loci celebrationis*, not as it existed at the time of the marriage, but as it exists at the time when the validity of the marriage is called into question. As stated above,<sup>4</sup> a choice of law rule does not contain any 'temporal dimension'. It does in certain cases expressly fix the relevant time for the selection of the connecting factor. In other cases there is no reference to time at all because the question admits of only one rational solution.<sup>5</sup> A specific reference to time in the choice of law rule serves solely the purpose of ascertaining the appropriate foreign law through the medium of a connecting factor. Once this is done its function is ended and the court is left to determine the conflicting claims of the parties by applying the chosen foreign law 'as it is when the question arises for decision'.

<sup>1</sup> Above, p. 67, n. 3, at p. 172. Lord Cohen, *ibid.*, at p. 179, quoted with approval a passage from Lord Haldane's judgment in *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, at p. 651 in which Lord Haldane remarked that 'no later French law which would apply nor any circumstances had cured the invalidity thus brought about'. Similarly, in *Re Pozot's Settlement Trusts*, [1952] 1 All E.R. 1107 the Court of Appeal did not apply foreign *lex domicilii* 'as it stood at the time' of the marriage to test the capacity of parties to marry but recognized its subsequent retrospective validation by decree. The case is unfortunately very inadequately reported.

<sup>2</sup> Cf. Mann, *op. cit.*, p. 236 and see Dicey, *op. cit.*, p. 612. It is regrettable that some judges made a somewhat half-hearted and, with respect, entirely unconvincing effort to distinguish *Lynch's* case. Barnard J., [1952] P. 135, at p. 144 thought that whilst in *Lynch's* case the relevant time to consider the foreign law was the time of death, in the present case the relevant time was the time of the second ceremony of marriage and that, accordingly, *Lynch's* case would have been in point only if the second ceremony had preceded the registration of the first. Although this reasoning is accepted by Somervell L.J. and by Lord Tucker, it is submitted that there is little substance in it. Essentially the question was the same in both cases: what is meant by the foreign 'law' to which an English court is referred? For Lord Penzance it meant its substantive rules only, for the House of Lords in *Starkowski's* case it included the transitional law as well. And see the unanswerable criticism of Mann, *op. cit.*, p. 236.

<sup>3</sup> By Mendes da Costa, *op. cit.*

<sup>4</sup> Above, p. 64.

<sup>5</sup> For instance the choice of law rule to govern the formal validity of a marriage ceremony or the commission of a tort.

The suggestion that the *ratio* of *Starkowski's* case is of general validity is in no way contradicted by admitting the necessity in certain circumstances to reject foreign retrospective legislation. It is, however, believed that every qualification must fall within the orbit of the doctrine of public policy. Four suggested qualifications to the general rule enunciated in *Starkowski's* case may be found in arguments of counsel, in some of the judgments and in the juristic appraisals of the case:

(i) The majority of judges left open the question of whether the Austrian retrospective legislation would have been applied if such legislation or the ensuing registration of the marriage had been preceded by the English marriage. Dr. Mann thinks that in such an event the validity of the English ceremony ought not to have been open to challenge. 'A new relationship would have come into existence and been consummated, which the *lex loci celebrationis* could not in justice undo.'<sup>1</sup> It is not believed that this explanation is adequate. Nor would it seem self-evident that public policy invariably demands that the English marriage should in these circumstances be protected.<sup>2</sup> It is perhaps relevant to recall domestic cases in which English courts did not hesitate to propound rules resulting indirectly in the nullification of marriages<sup>3</sup> or bastardizing of children,<sup>4</sup> if such course was dictated by what they believed to be the law. As, in the present hypothesis, compliance with the principle would in effect avoid the unfortunate result of the wife having two husbands, one under Austrian law and one under English law, one may well wonder whether resort to public policy would be of any obvious merit. Somervell L.J., at any rate, reading the judgment of the Court of Appeal, contemplated the possibility of the Court giving effect to express transitional rules of Austrian law even in such a contingency.<sup>5</sup>

(ii) Similar considerations apply in the event of the Austrian legislation being preceded by a decision of an English court declaring the invalidity of the Austrian marriage. All that need be added is that the finality of the

<sup>1</sup> Op. cit., p. 243. In Dicey, op. cit., pp. 232-3 it is stated that the point is doubtful. Mendes da Costa, op. cit., p. 257 argues in favour of the continued validity of the English marriage since at the time of the English ceremony, which he regards in this case as 'the relevant point of time', the Austrian ceremony was a nullity by the *lex loci celebrationis*. This argument cannot be accepted. Actual reference to foreign law must always be made when a point arises for decision in the English court.

<sup>2</sup> It has been argued that in problems concerning the incidental question it may even be necessary for the forum to deny recognition to its own divorce decree. See Gotlieb, op. cit. For a contrary view see Dicey, op. cit., p. 62.

<sup>3</sup> *Wiseman v. Wiseman*, [1953] P. 79.

<sup>4</sup> *Keyes v. Keyes*, [1921] P. 204.

<sup>5</sup> [1952] P. 302, at p. 307. It is, of course, quite likely that the foreign Act in question would itself contain provisions safe-guarding the validity of marriages celebrated before the coming into the effect of the Act or before registration. Lord Reid, above, p. 67, n. 3, at p. 172 referring to these suggested qualifications thought that 'it would not be proper to attempt to decide such questions in advance' but assumed 'for the purpose of the present argument that such exceptions would not be made'.



English decision may appear to call more imperatively for the setting in motion of the doctrine of public policy.

(iii) 'Logically what is true of validating legislation should be equally true of invalidating legislation.' Thus writes Dr. Cheshire, adding, 'but it is to be hoped that this is one of the many cases in which English law will pay no regard to logic'.<sup>1</sup> There is, however, no need to abandon logic but merely to admit that the principle of *Starkowski's* case is limited by the doctrine of public policy, the claims of which to attention in the present instance are particularly strong. Yet it is not beyond the bounds of possibility to imagine cases where the application of foreign retroactive invalidating legislation would not offend the policy of the forum. The notion of vested rights in the case of a change in the substantive rules of the *lex causae* is of very little assistance. So far as private international law is concerned, what foreign law gives it can validly take away.<sup>2</sup> In *Adams v. National Bank of Greece and Athens, S.A.* in the Court of Appeal Morris L.J. rightly pointed out that those who 'assert that Greek law can endow . . . must recognise that Greek law can disendow. If they aver that Greek law can create, they must accept that Greek law can change.'<sup>3</sup>

(iv) Dr. Mann, whilst generally in favour of the application by the English court of the transitional provisions of the *lex causae*, suggests that retroactivity should not be permitted to override a factual situation created under the earlier law. The learned writer doubts the correctness of

<sup>1</sup> Op. cit., p. 322. Other writers share this view. See Mendes da Costa, op. cit., p. 258 and Mann, op. cit., p. 245. Dr. Mann, *ibid.*, pp. 236-8, discusses four French cases (in the first three of which French courts for various reasons failed to apply foreign transitional law) as evidence that French courts often merely pay lip-service to the principle. Without denying that some decisions may be thus criticized many others could be cited in which the transitional law of the *lex causae* was scrupulously respected. See, generally, Gavalda, op. cit., pp. 341 et seq. Dr. Mann's fourth case (*Guerra c/Tissandier*, Tr. civ. Tulle, 6 janv. 1944, *Revue Critique*, (1947), p. 304) fully bears this out. Here the French Court recognized Spanish nationalist legislation which retrospectively annulled non-religious marriages celebrated in Spain between Spanish Catholics. Dr. Mann thinks it remarkable that this decision left French lawyers indifferent. Whilst the reverse decision on the grounds of *ordre public* would have been more acceptable, the Court merely followed what was an admitted rule of French law especially in matters of status. It is implicit in the judgment that had the parties not been of Spanish nationality the French Court would have resorted to the *ordre public*.

<sup>2</sup> Subject of course to the public policy of the forum. Since an English judge is supposed to regard foreign law as a fact, rights acquired by a litigant as a result of an English court 'applying' foreign law are in effect rights acquired under English law and in principle should not be affected by any subsequent change in the foreign law in question.

<sup>3</sup> Above, p. 65, n. 1, at pp. 365-6. For an example of the unhelpfulness of the concept of vested rights in this context see Diplock J. in *Adams' case*, above, p. 68, n. 2, at p. 77 and see below, p. 81, n. 3. Dr. Morris in Dicey, op. cit., p. 612 writes that it may be that *Lynch's* and *Aganoor's* cases require reconsideration in the light of *Starkowski's* case. He adds, however, that the cases are perhaps reconcilable on the basis that in *Starkowski's* case the foreign retrospective legislation had the effect of validating (not invalidating) a marriage while in *Lynch's* and *Aganoor's* cases it had the effect of depriving a beneficiary of a vested interest in his property. This explanation of *Lynch's* and *Aganoor's* cases which in effect suggests that vested interests in *property* are given a preferential treatment by the courts cannot be accepted without qualifications in the light of decisions (discussed below, pp. 78-81) dealing with discharge of contracts.

the decision in *Starkowski's* case. 'Could it not be said that the objective basis for recognising a foreign validation in England should be a *de facto* marriage continuing at the time of validation?'<sup>1</sup> The suggestion, with respect, is not convincing. In none of the judgments was this factor regarded as significant and it is not easy to see why foreign legislation disregarding it should inevitably offend the policy of the forum.<sup>2</sup> Most of Dr. Mann's arguments are borrowed from the field of the domestic doctrine of agency by ratification, which seems of little relevance in the present context. His suggestion would lead to many uncertainties in practice in the event, for instance, of a separation being merely temporary. It also seems somewhat arbitrary to determine the status of the children according to whether or not their parents happen to be living together at the right time.

In conclusion, it is submitted that the general rule of law as embodied in *Starkowski's* case is that the English court will apply the transitional provisions of the *lex causae* subject only to the overriding control of public policy.

#### (4) Adoption

*Re Marshall*.<sup>3</sup> Although certain passages in the judgment of the Court of Appeal, as read by Romer L.J., may lend colour to the contrary belief, the facts in the recent case of *Re Marshall* did not give rise to a conflict of laws in time. The substantial question before the court was whether a child validly adopted in British Columbia could take as 'issue' under the will of the testator who died domiciled in England. Both Harman J. and the Court of Appeal gave their answer in the negative. Both dealt with the matter in the language of succession rather than status. Under the relevant English choice of law rule<sup>4</sup> the will fell to be governed by English law as *lex successionis*. Apart from statute, the common law rule of construction, as stated in *Re Fletcher*,<sup>5</sup> is that when a testator uses the word 'child' or

<sup>1</sup> Op. cit., p. 244. Dr. Mann is of the opinion that only if the parties had at the time of registration still been living together, the retrospective validation of the marriage would have required international recognition and that this much and no more is proved by the numerous Marriage Validation Acts and by the French case of *Luna c/ Godin*, Bordeaux, 5 févr. 1883, *Clunet*, 621 which was quoted with approval by Barnard J. and the House of Lords. The writer finds it difficult to agree with this statement. The Marriage Validation Acts are not usually restricted in this way. As to the decision of the *Cour de Bordeaux*, it is beyond a shadow of doubt that the court did not regard the fact that the spouses were still living together as of any relevance. It cannot even be gathered from the judgment that they actually were so living; the decision would have been the same in either event.

<sup>2</sup> Apart from the policy of the forum the consideration of the justice or wisdom of such legislation is best left to the foreign *lex causae*.

<sup>3</sup> [1957] Ch. 507.

<sup>4</sup> Under another conflict rule the creation of the status of adoption is referred to the law of the domicile of the adopter and (*semble*) of the adopted person. But the Court did not subscribe to the view that the possessor of such a nominal status is *ipso facto* to be treated as if he had been adopted in England.

<sup>5</sup> [1949] Ch. 473.

'issue' in his will he does not intend adopted children to take. If, then a different intention is to be attributed to a testator,<sup>1</sup> so far as adopted children of foreign domicil are concerned, the rule, in the opinion of the Court of Appeal, should not be departed from further than is necessary. 'Only those children who are placed by adoption in a position, both as regards property rights and status, equivalent, or at all events substantially equivalent, to that of the natural children of the adopter can be treated as being within the scope of the testator's contemplation'.<sup>2</sup> Furthermore, such persons must have acquired these rights, at the latest, at the date of the testator's death, and no intention is to be attributed to the testator of extending his benevolence to persons who did not acquire such rights until after his death.

It should be appreciated that this perfectly logical sequence of reasoning concerns English domestic law as *lex successionis*.<sup>3</sup> On no account can it thus be said that the decision shows that the relevant English choice of law rule contains 'a temporal dimension' to the effect that to determine the rights of adopted children of foreign domicils to take under a gift to 'children' in an English will, reference is made to the domiciliary law as it existed at the date of death.<sup>4</sup> The Court of Appeal consulted the provisions of British Columbian adoption legislation at the time of the testator's death merely as part of its task of ascertaining the true intention of the testator in accordance with English domestic law, the law selected as appropriate by the English conflict rule.<sup>5</sup> What partly explains the difficulty in establishing the *ratio* of *Re Marshall* is the Court's mistaken, it is believed, reliance on the case of *Lynch v. Provisional Government of Paraguay*. This was prompted by the fact that whilst at the time of the testator's death the rights of an adopted person under British Columbian laws were strictly limited, they were later increased and in fact assimilated to those of legitimate children by new and retrospective legislation.<sup>6</sup> The Court of Appeal held that such subsequent legislation must be disregarded and that 'this view would appear to be consonant' with the principles on

<sup>1</sup> Evidently under the indirect impact of the passing of the Adoption Act, 1950, which was otherwise regarded as irrelevant. Legitimation cases show that English municipal law may contain special rules to deal with foreign status. This must be so of necessity in the realm of adoption since domestic adoptions alone are covered by the Act.

<sup>2</sup> Above, p. 76, n. 3, at p. 523.

<sup>3</sup> Cf. Webb, *Modern Law Review*, 20 (1957), p. 643. A very similar line was adopted by Gresson J. in the New Zealand case of *Re Brophy*, [1949] N.Z. L.R. 1006.

<sup>4</sup> See Mendes da Costa, *op. cit.*, p. 251.

<sup>5</sup> The problem was not which of two rival systems is to govern a distribution, but what intent is to be attributed to the testator.

<sup>6</sup> The two most important of these Acts were passed in 1953 and 1956. The Court of Appeal felt doubtful (disagreeing with Harman J.) whether the Act of 1953 had sufficiently advanced the position of adopted children. The Act of 1956 certainly did so but was enacted after the date of distribution. In the British Columbian case of *Re Stuart*, [1957] 10 D.L.R. (2d) 634 Whittaker J. held that the 1956 Act was intended by the Legislature to be retrospective.



which *Lynch's* and *Aganoor's* cases were decided.<sup>1</sup> With great respect, it is submitted that the reference to these cases in this connexion was entirely inconsistent with the main trend of the Court's reasoning. In *Lynch's* case the Court was faced with a true conflict in the rules of the foreign law selected to govern the distribution. The Court was thus concerned with a Paraguayan will and a change in the laws of Paraguay. In the present case the will was English and, as no changes occurred in the relevant provisions of English law,<sup>2</sup> no conflict of laws in time of any kind arose. In *Lynch's* case the foreign law was directly applied by the English Court as the law chosen to determine the claims of the parties. In *Re Marshall* English law remained throughout in control. The foreign law was not asked to decide the dispute but only referred to for the purposes of English law and at the time regarded as appropriate by English law.<sup>3</sup> As thus this limited reference to foreign law took place within the framework of the successional inquiry, throughout governed by English law, there was no imperative necessity to pay regard to the transitional provisions of the foreign system in question. It was only because the Court of Appeal treated the whole question as governed by English law that it did not take into account the Canadian case of *Re Stuart*,<sup>4</sup> which was brought to its attention and in which the Supreme Court of British Columbia regarded the adoption legislation, passed after the testator's death but prior to the date of distribution, as retrospective so that the testator was taken to have included adopted children, when he used the word 'issue' in his will. Romer L.J. admitted, in a different context, that 'the construction and effect of a foreign statute depends, of course, on the law of the country in which it was enacted, and this is treated in our courts as a question of fact'.

##### (5) *Discharge of contracts*

In private international law discharge is regarded as affecting the

<sup>1</sup> Above, p. 76, n. 3, at p. 525.

<sup>2</sup> The Adoption Act, 1950, was regarded by the Court as irrelevant. This article is not concerned with the controversy as to whether the Court of Appeal was right in giving such an extended scope to the law of succession at the expense of the law of status. Had the Court followed the status approach (in which the content of the status is largely disregarded), there would still be no conflict of laws in time as the adopted child did in fact possess the status of an adopted or legitimate child long before the death of the testator.

<sup>3</sup> It would appear that no other meaning need be attributed to the words of Harman J. that whilst the Court was dealing with an English will, which therefore had to be construed by English law, 'that does not preclude reference to the law of the domicile because the law of succession may import it': [1957] Ch. 263, at p. 273. Although the law of British Columbia was allowed to determine the contents of the status at a certain time, it was only because the English rules of construction of wills attributed to the testator, who used the word 'issue' in his will, an intention to benefit only such foreign adopted children as, at the time of his death, had under the law governing their adoption the same rights as if they had been born in lawful wedlock.

<sup>4</sup> Above, p. 77, n. 6. It should be added that the decision in *Re Stuart* concerned the 1956 Act which was passed after the death of the testator in *Marshall's* case. Whittaker J. was, however, of the opinion that that Act was wide enough in its retrospective effect to divest interests, which vested before it came into force.

substance of the obligation and, accordingly, is governed by the proper law of the contract. A contract is, of course, subjected to its proper law at the time of its making. Yet it has never been doubted that an English court, whenever seized of a question of contractual liability, instead of referring to the proper law as it stood at the time of the contract, would apply that law 'as it exists from time to time'.<sup>1</sup> Thus English courts applied provisions of the foreign law which interfered with existing contracts by annulling the contractual liability<sup>2</sup> or imposing a moratorium or a system of foreign exchange control<sup>3</sup> and turned a deaf ear to pleas voicing loss and injustice frequently caused by such legislation.

*R. v. International Trustee for the Protection of Bondholders A.-G.*<sup>4</sup> In the same way the courts held that the abrogation of gold clauses in contracts did not necessarily violate public policy.<sup>5</sup> In *R. v. International Trustee for the Protection of Bondholders A.-G.* the House of Lords held that the Joint Resolution of the United States Congress of 5 June 1933 should be fully applied, and allowed to determine the bounds of its application, with regard to contracts governed by the law of the State of New York. Their Lordships were mainly concerned with the question which law should govern the validity of the gold clause and assumed that, if this matter was left to the law of New York as the proper law of the contract, then, unquestionably, that law must decide whether subsequent legislation in that State intended to invalidate existing gold clauses or not. In its later decision in *New Brunswick Ry. Co. v. British and French Trust Corporation*<sup>6</sup> the House of Lords similarly took note of the transitional provisions of the *lex causae*. The foreign legislation in question, the Canadian Gold Clauses Act, 1937, was held by the Court not to be retrospective in the sense of not being intended to affect pending actions.<sup>7</sup>

*Kornatzki v. Oppenheimer*.<sup>8</sup> Again, English courts did not hesitate to

<sup>1</sup> *Re Chesterman's Trusts*, [1923] 2 Ch. 466, at p. 478, *per* Lord Sterndale.

<sup>2</sup> *Perry v. Equitable Life Assurance of the United States* (1929), 45 T.L.R. 468.

<sup>3</sup> *Re Helbert Wagg & Co.'s Claim*, [1956] Ch. 323; *Kahler v. Midland Bank*, [1950] A.C. 24.

<sup>4</sup> [1934] A.C. 500.

<sup>5</sup> It could of course sometimes have this effect, especially if it were of a discriminating character. See Nussbaum, *Money in the Law* (1950), p. 439. In many countries such legislation was not applied on the ground that it was contrary to public policy or that it had no extraterritorial effect. French courts, though for different reasons, refused also to apply German revalorization laws. See Gavalda, *op. cit.*, pp. 380 et seq., who, however, stresses that there is no French case in which foreign law was rejected merely because it was retrospective.

<sup>6</sup> [1939] A.C. 1.

<sup>7</sup> Before the Act was passed the bonds had been repudiated and an action had been commenced in this country. See, in particular, the judgment of Lord Wright. Two of their Lordships (Lords Thankerton and Russell) went further and thought that the Act was merely designed to affect future contracts, thus placing an unduly narrow construction on the Act. Otherwise, however, the strictures of Nussbaum, *op. cit.*, p. 439 are excessive. In the present context the main significance of the judgment is that the House of Lords left the question of retroactivity to the foreign law and it is thus fully consistent with *R. v. International Trustee*.

<sup>8</sup> [1937] 4 All E.R. 133. See also *Re Schnapper*, [1936] 1 All E.R. 322. The reasons for the

apply the provisions of the proper law of contract or other obligation in cases where that law, owing to the subsequent depreciation of currency in which the debt was expressed, imposed a duty on the debtor to revalorize the debt. This course was adopted notwithstanding that some aspects of the revalorization legislation must have struck the courts in this country as unfamiliar and extravagant.

It is submitted that this attitude is obviously well founded. The appropriate foreign law must remain in full control of the contract and the English judge should apply it as a foreign judge would. Admittedly, contracts exhibit certain features which, it may be argued, require them to be treated as a special case. These, however, are not decisive in the present context. Thus it may be said that the parties must be taken to have assumed the risks involved in the submission to any particular system.<sup>1</sup> But, if intention is to be the governing factor, it may equally well be said that the parties' submission to a foreign law must be construed so as to be confined to the law as it stood when the contract was made.<sup>2</sup> Besides, in the field of succession to movables the law of the testator's domicile at death is selected as being most probably in accordance with his wishes.<sup>3</sup> It is believed that the principle of *R. v International Trustee* is material whenever the English court is directed by an English conflict rule to refer a matter or dispute for decision to foreign law.

*Adams v. National Bank of Greece and Athens, S.A.*<sup>4</sup> In this very recent decision the Court of Appeal fully endorsed the view that an English court applies foreign law as it stands at the time of the English proceedings. The plaintiffs were holders of sterling bearer bonds which had been issued in 1927 by the National Mortgage Bank of Greece and had been guaranteed by the National Bank of Greece. In 1949 the Greek Government passed a law suspending all obligations on the bonds and creating a moratorium. In 1953 the guarantor of the bonds, the National Bank of Greece, was amalgamated with the National Bank of Athens, which had assets in England, to form the National Bank of Greece and Athens. All the assets and

application of the German revalorization law in this case are obscure. See Kahn-Freund, *Annual Survey of English Law* (1936), p. 360 and Mann, *The Legal Aspect of Money* (2nd ed., 1953), pp. 242-4. Although the only possible legal basis for the claim of the plaintiff was the will which was governed by English law, the Court, in accordance apparently with the intention of the testator, referred to German law to establish the amount of the legacy. The interesting point is not only that this intention was respected, but that in ascertaining the amount due the Court applied German law, not as it existed at the time of the testator's death, but as it stood at the date when the legacy became payable.

<sup>1</sup> See Nussbaun, *op. cit.*, p. 416.

<sup>2</sup> Such a construction would seem inadmissible, yet it provided the basis for the decision of the *Cour de Cassation* in 1935: *Cass. civ.*, 15 mai 1935, *Revue Critique* (1936), p. 463, with a note by Niboyet.

<sup>3</sup> It may also be said that contracts create continuous obligations which it is proper to submit to a legal system with all its subsequent legislative evolutions. The same, however, is true of a settlement by will.

<sup>4</sup> [1959] 2 W.L.R. 800. Leave to appeal to the House of Lords was granted.



liabilities of the old banks were transferred by way of universal succession to the new company. In *Metliss v. National Bank of Greece and Athens, S.A.*<sup>1</sup> the House of Lords held that although the proper law of the bonds was English law, effect must be given to the decree of 1953 and the new company must be regarded as having succeeded to the liabilities of the old National Bank of Greece. On 16 July 1956 the Greek Government passed a decree amending the decree of 1953 by enacting that the new bank, as from the date of its creation, became the universal successor to the rights and obligations of the companies amalgamated except for liability on bonds payable in gold or foreign currency. Under Greek law this decree had a retrospective effect and absolved the defendants from the obligations of the original guarantor bank in respect of the bonds. In the present case the Court of Appeal held that the same effect must be given to this decree by courts in this country. It is submitted that the decision is plainly right. The defendants were under no liability in English law, the proper law of the bonds, since there was no novation of the original contract of guarantee. In *Metliss'* case the House of Lords held the defendants liable on identical bonds by classifying universal succession to contractual liability as relating to the status of a company and not to discharge of contracts<sup>2</sup> and thus allowing Greek law to transfer to the defendants the liability of the dissolved bank. After 16 July 1956, however, there was in existence no provision of Greek law transferring that liability to the defendants and thus on the facts before the Court in the present case the defendants were strangers to the contract.<sup>3</sup> The plaintiffs could only succeed by reference to Greek law and 'those who need recourse to Greek law must take it as they find it. . . . If they need to have the foundation of Greek law on which to build a claim, they can hardly say that Greek law as it used to be suits them far better than Greek law as it is.'<sup>4</sup>

## IV

The question posed in this article was in what manner the courts in this

<sup>1</sup> [1958] A.C. 509.

<sup>2</sup> Cf. Korah, *Modern Law Review*, 21 (1958), p. 425.

<sup>3</sup> Diplock J., above, p. 68, n. 2, reached a different conclusion; he held that the defendants were before 16 July 1956 under a liability in English law and that the new Greek decree could not be allowed to extinguish it. But, with respect, the defendants in the actual case before the Court were under no liability in English law. They were held liable on identical bonds to the plaintiffs in *Metliss'* case because the House of Lords referred the matter of universal succession to Greek law and because by Greek law, as it then existed, the defendants were such successors. But Greek law (it is immaterial whether it is treated as fact or law: above, p. 65, n. 1) was altered before the bonds in *Adams'* case were presented for payment. The existence of a debtor must be established separately in the case of every contract. It seems that Diplock J.'s decision is logically tantamount to the acceptance of the argument put by Counsel, that if the new Greek law had been the original one English courts would have applied part of it and refused to apply the other. Although the judge questioned this argument there is, in effect, no alternative between it and the view taken by the Court of Appeal which held that such selectiveness could not be justified. It can also be said that nothing short of truly universal succession can be regarded as a matter of status; Carter in this *Year Book*, 33 (1957), p. 343.

<sup>4</sup> Above, p. 80, n. 4, at p. 365.

country deal with the change in the content of either the conflict rule of the forum or the substantive rule of the foreign system designated under a conflict rule of the forum. Whilst there can be no doubt that in the former case ordinary transitional rules of the forum are applicable, it would appear equally clear that in the latter case reference should be made to the transitional rules of the *lex causae*. There is no general principle that any foreign legislation which is retrospective is by virtue of that fact alone contrary to public policy and in every instance in which the House of Lords was concerned with the conflict of laws in time, it paid full regard to the transitional provisions of the foreign law to which it was directed by an English conflict rule. Such decisions of the lower courts which adopt, or are alleged to adopt, the opposite view can only be claimed to be still binding by denying the profound unity of the subject.<sup>1</sup> Whereas in the discussion concerning the doctrine of *renvoi* a strong case can be put for a flexible approach, nothing would seem to be gained from the piecemeal treatment of conflicts of laws in time. On the contrary, the solution advocated in the present paper and which, it is believed, represents the existing law, combines simplicity with the greatest prospect of promoting the progressive development of private international law.

<sup>1</sup> That this unity has not yet been clearly seen is due no doubt to the fact that premature generalizations are contrary to the spirit of the common law. The reference to *Lynch v. Provisional Government of Paraguay*, above, p. 62, n. 5 in the cases of *Starkowski v. A.-G.* above, p. 67, n. 3, *Re Marshall*, above, p. 76, n. 3 and *Adams v. National Bank of Greece and Athens, S.A.*, above, pp. 68 and 80, nn. 2 and 4, is a hopeful sign.

# THE INCIDENCE OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES<sup>1</sup>

By THEODOR MERON, M.J., LL.M., S.J.D.

*Assistant Legal Adviser to the Israel Ministry for Foreign Affairs*

THE object of this paper is to examine briefly some aspects of the incidence of the rule of exhaustion of local remedies. While the rule itself is well established in international jurisprudence and has recently been applied by the International Court of Justice in the *Interhandel* case (*Switzerland v. United States of America*) (Preliminary Objections),<sup>2</sup> both its basis and the limits of its applicability are rather vague. Lord McNair has cogently observed that the rule which is 'both ancient and commonplace . . . is so fundamental that it has become almost a cliché and it is difficult to find any real analysis of its meaning'.<sup>3</sup> Bearing in mind the practical importance of the rule in international law, it is to be regretted that comparatively little thought has so far been given to its detailed examination and to the precise delimitation of its scope. A notable exception is Judge Bagge's article in the previous number of this *Year Book*.<sup>4</sup> That article was concerned primarily with the principles governing the operation of the local remedies rule, given that the conditions exist for applying the rule. It is also necessary, however, to examine under what conditions the rule is brought into play at all. The need for such an examination becomes even greater in view of the recent tendency to regard the rule of local remedies as applicable to all, or almost all cases of so-called diplomatic protection of citizens abroad, and as being the condition *sine qua non* for the institution of any international proceedings by the State whose national has been injured abroad by another State in alleged violation of international law.<sup>5</sup> It is common nowadays to pay little attention to the historical evolution of the rule and to consider it a formal, technical rule of most general applicability, which must be followed before diplomatic protection may be exercised.<sup>6</sup> At the same time, it has become increasingly difficult to plead successfully before international tribunals that justice would be denied in the courts of the respondent

<sup>1</sup> © T. Meron, 1960.

<sup>2</sup> *I.C.J. Reports*, 1959, p. 6.

<sup>3</sup> *International Law Opinions* (1956), vol. 2, p. 312.

<sup>4</sup> See also an important note by Fawcett, 'The Exhaustion of Local Remedies: Substance or Procedure?', this *Year Book*, 31 (1954), p. 452.

<sup>5</sup> See in this connexion the Dissenting Opinion of Judge Armand-Ugon in the *Interhandel* case, *I.C.J. Reports*, 1959, p. 89.

<sup>6</sup> Compare Judge Armand-Ugon, *ibid.*, at p. 87: 'The principle of the exhaustion of local remedies is not absolute and rigid; it has to be applied flexibly according to the case. Some situations or facts may entitle the Court to accede to a request, even if the remedies have not been completely exhausted.'



State, even when there appeared to exist no remedy in the domestic law of that State for the alleged wrong.<sup>1</sup> It would probably be even more difficult to convince an international tribunal that in certain cases it would be unjust or unreasonable to compel the injured individual to seek justice in the courts of the wrong-doing State.

*Injuries Caused by One State to Another*

It may be convenient to begin these observations by recalling the well-known proposition, according to which the rule of local remedies is applicable only to cases which are genuine cases of diplomatic protection, and is not applicable to cases primarily based on a direct breach of international law, causing immediate injury by one State to another<sup>2</sup> (hereinafter referred to as cases of 'direct injury'). The distinction between cases of diplomatic protection and cases of direct injury is generally recognized.<sup>3</sup> Professor Jessup observes that 'various situations in the history of international claims reveal that in addition to the rights of its nationals a state has, in its relations with other states, certain rights which appertain to it in its collective or corporate capacity. The typical cases are those in which injury is done to an official of the state, particularly a consular or diplomatic official.'<sup>4</sup> Treatises on international law contain many examples of categories of acts of one State considered to involve a direct injury to another State, and as such not subject to the local remedies rule.<sup>5</sup> One of the more common examples is an injury to a State's national flag.<sup>6</sup> Professor Jessup has suggested that: 'It should be one of the tasks in the codification of international law to catalogue the types of direct injuries to states for which the state would be privileged to require another state to pay such indemnity as might be determined by an international tribunal to be appropriate to the case.'<sup>7</sup> It is submitted that such a task—desirable as it may be—would be extremely difficult. For not only the subject of the dispute but also the nature of the claim would be relevant in drawing up such a catalogue. Moreover, new categories of direct injuries evolve constantly according to the necessities of international life. It seems preferable to define cases of direct injury by reference to general legal principle.

The principal reason for the non-applicability of the rule of exhaustion of local remedies to cases of direct injury is that in such cases the injured

<sup>1</sup> See the Separate Opinion of Judge Sir Hersch Lauterpacht in the *Certain Norwegian Loans* case, *I.C.J. Reports*, 1957, pp. 39-41.

<sup>2</sup> See Eagleton, *The Responsibility of States in International Law* (1928), pp. 51, 103; Freeman, *The International Responsibility of States for Denial of Justice* (1938), p. 404.

<sup>3</sup> See, for example, Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (2nd ed., 1947), vol. 2, p. 888: 'Claims may be divided into two broad classes: first, those which are based upon private complaints of individuals whose government acts as their representative in espousing their cause; secondly, those which "concern the State itself considered as a whole".'

<sup>4</sup> *A Modern Law of Nations* (1952), p. 118.

<sup>5</sup> See, for example, *ibid.*, pp. 118-20.

<sup>6</sup> Eagleton, *op. cit.*, p. 80.

<sup>7</sup> *Op. cit.*, p. 120.

State represents principally its own interests rather than the interests of its nationals and is the real claimant. It follows that a request by the respondent State that the claimant State should exhaust the legal remedies available in the former State<sup>1</sup> would run counter to the principle *par in parem non habet imperium, non habet jurisdictionem*.

Admittedly, approached from the point of view of the Vattelien theory that 'whoever ill-treats a citizen indirectly injures the State'<sup>2</sup> (which still appears to be the major theory of the law of responsibility of States for injuries to aliens<sup>3</sup>), there is a degree of inconsistency in distinguishing between cases of diplomatic protection and cases of direct injury. After all, it can be argued that in both cases it is the State itself which sustained the injury, and that in espousing the cause of its national the State does no more than protect its own interests. Despite this criticism,<sup>4</sup> the logic of which cannot be entirely denied, the distinction between cases of direct injury caused by one State to another and cases of diplomatic protection in which the State espouses the cause of its national who has been injured by another State, is real and necessary and is supported by both practice and literature.

An attempt to formulate a general theoretical distinction between cases of direct injury and cases of diplomatic protection is bound to be difficult. In the first place it should be observed that there is an extremely close connexion between all the facts of a given case and the classification of that case as one belonging to either of these two categories. A single set of facts giving rise to international legal proceedings may contain elements of both diplomatic protection and direct injury. There may be facts giving rise principally to a case of diplomatic protection which do not, except in the Vattelien sense, contain distinct elements of direct injury. One could conceive also of an opposite case in which the facts give rise primarily to

<sup>1</sup> Instances of this are rare. For a recent example of a claim which was alleged to be inadmissible because the Applicant Government had not exhausted legal remedies in the courts of the Respondent State see the Pleadings of the Parties in the case of the *Aerial Incident of 27th July, 1955* (Israel v. Bulgaria) (Preliminary Objections). The following statement was made on behalf of the Applicant Government: 'We can recall no precedent in which a government complaining of actions performed by another government *jure imperii* has been referred to the Courts of the respondent State as a preliminary condition to the obtaining of international satisfaction. Our claim is for a declaration of Bulgarian responsibility under international law, and we submit that no domestic court . . . is competent to make such a declaration which alone can lead to the satisfaction of our international claim. *Par in parem non habet imperium, non habet jurisdictionem*' (26 March 1959), *Oral Arguments*, p. 154.

<sup>2</sup> *Le Droit des Gens* (1758), liv. 2, sec. 71, Carnegie Translation, p. 136.

<sup>3</sup> See Art. 1 of the 'Harvard Research on the Law of Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners', *American Journal of International Law*, 23 (1929), Supp., p. 133: 'A state is responsible . . . when it has a duty to make reparation to another state for the injury sustained by the latter state as a consequence of an injury to its national.' See also the case concerning the *Factory at Chorzów* (Claim for Indemnity—Merits) (Germany v. Poland), *P.C.I.J.*, Series A, No. 17, pp. 27–28, and the *Mavrommatis Palestine Concessions* case (Greece v. Great Britain) *ibid.*, No. 2, p. 12.

<sup>4</sup> For criticism of the Vattelien theory see generally, Jessup, *op. cit.*, p. 116; Briggs, *The Law of Nations* (2nd ed., 1953), p. 735.

a case of direct injury and in which the element of diplomatic protection is rather indistinct. But most cases of direct injury contain, in a certain degree, also elements of diplomatic protection. It may well be that at the bottom of almost every international claim there is the motivating factor of interests of individuals which need protection. It is suggested that the classification of a case as one of direct injury or as one of diplomatic protection depends on the element or elements which are preponderant. It is further suggested that once a case has been classified in this way, the international claim, including all its elements, must generally be regarded as a unity and may not be split into its constituent elements, such as those of direct injury and those of diplomatic protection.

Before proceeding further to examine the theoretical distinction between cases of direct injury and of diplomatic protection, it is proposed to illustrate some of the observations made in the immediately preceding paragraph. A case of an injury caused to an individual alien in State A by an organ of that State and resulting in a claim for pecuniary compensation by State B (of which the injured person is a national) would normally be regarded as a case of diplomatic protection. However, if the diplomatic negotiations between the two States prove unsuccessful, and State B applies to the International Court of Justice complaining of a breach of certain treaty obligations by State A (as shown by its conduct towards the injured alien) and asking principally for a declaratory judgment based on the interpretation of the treaty, this would appear to be a case of direct injury to which the rule of local remedies would not be applicable. Or let us consider the case in which an ambassador of State A would be imprisoned by the organs of the receiving State B. This case would contain elements both of direct injury and of diplomatic protection, but since the former would be overwhelmingly preponderant, the case would be considered as one of direct injury and not subject to the rule of local remedies. Even a classic case of direct injury, such as that of damage caused to a naval vessel of one State by a mine illegally planted in time of peace by another State on an international waterway, would not be entirely devoid of elements of diplomatic protection by the flag State of the naval personnel aboard the vessel. It thus appears clearly that the classification follows the elements which are preponderant.

Generally speaking, it is suggested that in classifying a case as one of direct injury or of diplomatic protection, regard must be had to two main factors: the action which is impugned in the proceedings or the *subject of the dispute*, and the *nature of the claim*.<sup>1</sup> As regards both these factors, what

<sup>1</sup> See, in this connexion, Article 32, paragraph 2, of the Rules of the International Court of Justice: 'When a case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1, of the Statute, indicate the party making it, the party against whom the claim is brought and the *subject of the dispute*. It must also, as far as



matters is the judicial appreciation of their true substance rather than their formulation by a party to the proceedings.

① In the consideration of the *subject of the dispute*, much guidance can be found in international practice. Certain categories of acts have been considered to amount to direct injuries, such as (in certain circumstances) injuries<sup>2</sup> caused by one State to officials of another State, and particularly its consular or diplomatic representatives, violations of treaties<sup>2</sup> or the destruction of property owned by a State and serving public functions.<sup>3</sup> Other categories of acts, normally injuries caused to private individuals, have been considered as giving rise only to cases of diplomatic protection.

② Turning to the significance of the *nature of the claim* for the classification of a case, it is suggested that the true test is to be found in the real interests and objects pursued by the claimant State. In this respect there is a distinction of substance to be drawn between the case in which the claimant State is prompted to bring the claim in order to secure objectives principally its own, and the case in which the claimant State is only espousing or adopting the cause of its subject, 'and is proceeding in virtue of the right of diplomatic protection'.<sup>4</sup> On this basis, it would appear that when the

possible, specify the provision on which the applicant founds the jurisdiction of the Court, state the precise *nature of the claim* and give a succinct statement of the facts and grounds on which the claim is based, these facts and grounds being developed in the Memorial, to which the evidence will be annexed.' Italics added. Note that the present paper is concerned with the substantive significance of the factors involved, not with the more formal and procedural features concerning the jurisdiction of the International Court of Justice and the relationship between the Application, the Memorial and the Pleadings.

<sup>1</sup> See Jessup, *op. cit.*, pp. 118-20.

<sup>2</sup> See the discussion of the subject of the dispute by the Permanent Court of International Justice in the case of *Phosphates in Morocco (Italy v. France)* (Preliminary Objections), *P.C.I.J.*, Series A/B, No. 74, pp. 25-29. Note particularly the following statement of the Court: 'The Court cannot regard the denial of justice alleged by the Italian Government as a factor giving rise to the present dispute. In its Application, the Italian Government has represented the decision of the Department of Mines as an unlawful international act, because that decision . . . constituted a violation of the vested rights placed under the protection of the international conventions. That being so, it is in this decision that we should look for the violation of international law—a definitive act which would, by itself, directly involve international responsibility. This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States. In these circumstances the alleged denial of justice . . . merely results in allowing the unlawful act to subsist. It exercises no influence either on the accomplishment of the act or on the responsibility ensuing from it.' *Ibid.*, at p. 28.

<sup>3</sup> E.g. the destruction of a naval vessel. See also Wortley, *Expropriation in Public International Law* (1959), p. 140: 'It is clear from the assessment of compensation in the *Corfu Channel* case that where property owned by State A is directly injured by a breach of international law committed by State B, there can be no question of compelling State A, the State injured, to resort to the local courts of State B. Despite the claim of Albania to the contrary, the International Court of Justice has power to assess compensation arising from a liability in international law which it has found to exist between one State and another, without resorting to local tribunals.' It is suggested that while the circumstances involved in the *Corfu Channel* case clearly support the existence of a direct injury, it may well be that having regard to the special circumstances in which jurisdiction was accepted by Albania, the case cannot be regarded as an authority for the rule of local remedies.

<sup>4</sup> See the Order of the International Court of Justice of 5 July 1951 indicating interim measures of protection in the *Anglo-Iranian Oil Co. case (United Kingdom v. Iran)*, *I.C.J. Reports*, 1951, p. 92.

claimant State is proceeding in virtue of the right of diplomatic protection, and despite a certain refinement of the doctrinal position,<sup>1</sup> that State has no distinct interest in the claim apart from the interest of its national whose cause is thus espoused. But the position would appear to be entirely different in a case which is not one of diplomatic protection in that sense, i.e. in a case where the initial act of the respondent State is a direct infringement of the rights of the claimant State according to international law. Such an immediate breach of international law is actionable at once, and the rules regarding denial of justice and exhaustion of local remedies do not come into operation at all. Here the State has a distinct reason of its own for the institution of the international claim, and only direct satisfaction to that State can lead to the settlement of the dispute.

In connexion with this test, consideration of the final submission<sup>2</sup>—the 'precise and direct statement of a claim'<sup>3</sup>—can be of some assistance. They should give a clear indication of the relief sought, and hence of the real interests and objects pursued by the claimant State. Yet this must be met with reserve. Admittedly, the significance of the relief sought by itself, as expressed in the submissions, may be limited because of their purely subjective character. It is doubtful whether the Court would allow itself to be persuaded exclusively by questions of form and of legal ingenuity by reference to the relief sought, if the result would be to avoid the application of the local remedies rule to a genuine case of diplomatic protection. However, although the question whether the State is *entitled* to a particular type of relief is a matter for judicial determination, the fact that the State *desires* a particular type of relief can be indicative of the real interest of that State in pursuing the case. That expression of its desire illustrates how it regards the possible settlement of the dispute. (For instance, in cases of diplomatic protection the State normally seeks pecuniary compensation or possibly restitution of property, which would satisfy the claims arising from injuries originally caused to the individuals.) But this—at least by itself—would rarely be an appropriate form of relief to a claim arising from a direct injury to the State. In such cases, an award of pecuniary compensation for its nationals who were incidentally injured by the impugned act is a secondary object; the primary object is to obtain from an international tribunal some

<sup>1</sup> In the *Mavrommatis Palestine Concessions* case (*Greece v. Great Britain*), the Permanent Court of International Justice made the following statement: 'By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law.' *P.C.I.J.*, Series A, No. 2, p. 12. This was reaffirmed by the Permanent Court in the *Serbian Loans* case (*France v. Kingdom of Serbs, Croats and Slovenes*), Series A, No. 20, p. 17, and by the International Court of Justice in the *Nottebohm* case (*Liechtenstein v. Guatemala*) (Second Phase), *I.C.J. Reports*, 1955, p. 24.

<sup>2</sup> See Articles 42 and 74 of the Rules of the International Court of Justice.

<sup>3</sup> *Fisheries case* (*United Kingdom v. Norway*), *I.C.J. Reports*, 1951, p. 126.

declaration of the responsibility of the respondent State in international law,<sup>1</sup> or the establishment of an arbitral tribunal,<sup>2</sup> or some other remedy such as a binding interpretation of a treaty,<sup>3</sup> or an official apology due to the claimant State in its quality as a State.<sup>4</sup> The claim for pecuniary compensation, designed to satisfy private claims, if any, arising out of the same set of impugned actions would be merely consequential. Moreover, owing to the difference between the interests of the State and of the injured individuals, the fate of such domestic claims as may have been filed by them in the courts of the respondent State would have no decisive importance for the international claim.

Now, it is admitted that a claimant State, in order to escape the applicability of the local remedies rule, could attempt to formulate its claim in such a way as to indicate a separate interest of its own and the existence of a direct damage caused to itself in breach of international law. But this is not an insuperable difficulty. International tribunals can distinguish between a mere form of words and the real substance of the claim, in order to determine whether it is indeed based on a direct injury or merely on the exercise of the right of diplomatic protection. The Court may thus consider the object of the claim, not merely its formulation.

In fact, this was one of the problems with which the International Court of Justice was confronted in the *Interhandel* case<sup>5</sup> which involved the expropriation of assets in the United States of a Swiss Company (*Interhandel*). The Court regarded the subject of the dispute submitted to it as restitution of the assets of *Interhandel* vested in the United States.<sup>6</sup> This type of a

<sup>1</sup> See, for example, *Corfu Channel* case (*United Kingdom v. Albania*) (Merits), *I.C.J. Reports*, 1949, pp. 9-10; *Aerial Incident of 27th July, 1955* case (*Israel v. Bulgaria*) (Preliminary Objections), *I.C.J. Reports*, 1959, p. 129.

<sup>2</sup> E.g. *Ambatielos* case (*Greece v. United Kingdom*) (Merits: Obligation to Arbitrate), *I.C.J. Reports*, 1953, p. 10.

<sup>3</sup> See, for instance, the case of the *Aargauische Hypothekenbank* (*Swiss Confederation v. Federal Republic of Germany*) decided by the Arbitral Tribunal for the Agreement on German External Debts, *Reports of Decisions and Advisory Opinions*, No. 1, 1958. The Arbitral Tribunal held unanimously that the rule requiring the exhaustion of local remedies did not apply to the case at all, because Switzerland 'has not made a claim for damages against the Federal Republic . . . but merely requests a decision of the Arbitral Tribunal on the interpretation and application of Annex VII in conjunction with Annex II to the Debt Agreement in a particular dispute'. *Ibid.*, p. 24.

<sup>4</sup> Compare generally, Garcia Amador, 'First Report on International Responsibility, U.N. Doc. A/CN.4/96', *Yearbook of the International Law Commission* (1956), vol. 2, chapter viii, paras. 192-218, particularly paras. 200, 211; 'Third Report on International Responsibility, U.N. Doc. A/CN.4/111', *ibid.*, (1958), vol. 2, chapter ix, paras. 13-16. For an illustration of a case where the destruction of a Canadian merchant vessel by the United States Coast Guard was considered to constitute an injury caused to Canada, necessitating an official apology and material amend by the United States, see *The P'm Alone* (*Canada v. U.S.A.*), *R.I.A.A.*, 1935, vol. 3, p. 1611, at p. 1618.

<sup>5</sup> *I.C.J. Reports*, 1959, p. 6.

<sup>6</sup> See *ibid.*, pp. 21 et seq. This concept of the subject of the dispute was not accepted by several judges who believed that the real dispute concerned the legal status of *Interhandel* (enemy or neutral). See, for example, Separate Opinions of Judge Córdova, *ibid.*, p. 41, and of Judge Hackworth, *ibid.*, pp. 38-40.



case would normally be regarded as one particularly suited for espousal by the national State in exercise of the right of diplomatic protection. Indeed, despite Swiss contentions to the contrary, the Court regarded the case as one of diplomatic protection. The subject of the Swiss claim was summarized by the International Court of Justice as follows:

*Interhandel* ' (1) as a principal submission, the Court is asked to adjudge and declare that the Government of the United States is under an obligation to restore the assets of . . . Interhandel . . . ;

' (2) as an alternative submission, the Court is asked to adjudge and declare that the United States is under an obligation to submit the dispute to arbitration or to a conciliation procedure. . . .'<sup>1</sup>

The third Preliminary Objection of the United States, which was upheld by the Court, read as follows: ' . . . there is no jurisdiction in this Court to hear or determine the matters raised by the Swiss Application and Memorial, for the reason that *Interhandel*, whose case Switzerland is espousing, has not exhausted the local remedies available to it in the United States courts'.<sup>2</sup> Subsequently to the filing of the Swiss Application instituting proceedings in the International Court of Justice, the Supreme Court of the United States reversed the judgment of the Court of Appeals dismissing *Interhandel*'s suit and remanded the claim of *Interhandel* to the District Court, thus opening to it remedies available in United States law.

Referring to the principal submission of Switzerland, the Court made the following statement:

'The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system. *A fortiori* the rule must be observed when domestic proceedings are pending, as in the case of *Interhandel*, and when the two actions, that of the Swiss company in the United States courts and that of the Swiss Government in this Court, in its principal Submission, are designed to obtain the same result: the restitution of the assets of *Interhandel* vested in the United States.'<sup>3</sup>

The underlying reasoning is clear: The Court stressed the essential similarity of the interests and actions of *Interhandel* (in the proceedings instituted by it in the courts of the United States) and of Switzerland (in the International Court of Justice), and the absence of any distinct interest of Switzerland as a State in the claim. The Court considered that the claim before it was designed—in the exercise of the right of diplomatic protection—to achieve the same object as that pursued by *Interhandel* in the courts of the United States.

<sup>1</sup> *I.C.J. Reports*, 1959, p. 19.

<sup>2</sup> *Ibid.*, p. 11.

<sup>3</sup> *Ibid.*, p. 27.

The Swiss Government argued also that its principal submission was a claim for the implementation of a decision based on an international agreement. The failure by the United States to implement such an international decision 'constitutes a direct breach of international law, causing immediate injury to the rights of Switzerland' and the rule of local remedies is not applicable.<sup>1</sup> The Court rejected this argument and stated that:

'Without prejudging the validity of any arguments which the Swiss Government seeks . . . to base upon that decision, the Court would confine itself to observing that such arguments do not deprive the dispute which has been referred to it of the character of a dispute in which the Swiss Government appears as having adopted the cause of its national, Interhandel, for the purpose of securing the restitution to that company of assets vested by the Government of the United States. This is one of the very cases which give rise to the application of the rule of the exhaustion of local remedies.'<sup>2</sup>

It rather appears as if the Swiss argument that the case was one of direct injury remained not entirely answered in the Judgment of the Court.<sup>3</sup> The Court satisfied itself with stressing the representative character of the claim of Switzerland, which was designed to secure the restitution of Interhandel's assets in the United States, and regarded the case as a typical case of diplomatic protection, to which the rule of local remedies is applicable.

The Court followed similar reasoning in discussing the alternative submission of Switzerland. Following on this point arguments put forward by the United States,<sup>4</sup> the Court held that

' . . . one interest, and one alone, that of Interhandel, which has led the latter to institute and to resume proceedings before the United States courts, has induced the Swiss Government to institute international proceedings. This interest is the basis for the present claim and should determine the scope of the action brought before the Court by the Swiss Government in its alternative form as well as in its principal form. On the other hand, the grounds on which the rule of the exhaustion of local remedies is based are the same, whether in the case of an international court, arbitral tribunal, or conciliation commission. In these circumstances, the Court considers that any distinction

<sup>1</sup> Ibid., p. 28.

<sup>2</sup> Ibid., pp. 28-29.

<sup>3</sup> This part of the Judgment was forcefully criticized by Judge Armand-Ugon in his Dissenting Opinion. Judge Armand-Ugon stressed that: 'The Interhandel claim seeks to obtain by methods of local redress a decision by the American courts that the . . . act of vesting is a violation of domestic law, whilst the Application of the Swiss Government is based upon damage caused by the breach of an international agreement and of the law of nations . . . the local remedies sought . . . might not afford a final redress to satisfy the case put forward by the Swiss Government. Where a question of international law is involved, only an international court can give a final decision . . . the Court cannot enter the field of hypotheses; it must abide by the terms of the Interhandel claim. The Application of the Swiss Government seeks (rightly or wrongly) reparation for direct damage caused to a State. . . . The examination of the Third Objection means prejudging a point which can only be dealt with along with the merits. The rule of the exhaustion of local remedies does not apply to a case in which the act complained of directly injures a State. Is that act or is it not a breach of international law?' Ibid., pp. 88-89.

<sup>4</sup> ' . . . this claim, while not identical with the principal claim, is designed to secure the same object, namely, the restitution of the assets of Interhandel . . . and . . . for this reason the Third Objection applies equally to it.' Ibid., p. 29.

so far as the rule of the exhaustion of local remedies is concerned between the various claims or between the various tribunals is unfounded.<sup>1</sup>

Before completing this discussion of the *Interhandel* case, it is proposed to examine briefly the Opinion of Judge Basdevant. Concurring in the conclusion of the Court regarding the non-admissibility of the Swiss Application, but not in the reasoning of the Court, Judge Basdevant considered 'that, in order to assess the validity of the objections advanced, he should direct his attention to the subject of the dispute and not to any particular claim put forward in connection with the dispute'.<sup>2</sup> He satisfied himself with the statement in the Swiss Application which indicated the subject of the dispute submitted to the Court as 'the restitution by the United States of the assets' of *Interhandel*. While refraining from considering any particular claim put forward in connexion with the dispute so defined, Judge Basdevant concluded that 'the subject of the dispute justifies . . . the requirement of the preliminary exhaustion of local remedies on the ground that if, through them, *Interhandel* obtains satisfaction, the subject of the dispute will disappear'.<sup>3</sup> It is suggested that while Judge Basdevant's approach may have considerable practical value, this approach—which omits to consider the claim and bases itself exclusively on the definition of the dispute in order to decide whether the rule of local remedies is applicable—is too narrow. It would appear that both the dispute and the claim are of relevance in this connexion. Indeed, the Court considered the applicability of the objection relating to non-exhaustion of local remedies not only in the light of the subject of the dispute, but also by reference to both the principal and the alternative Swiss submissions.

At this juncture, to complete this part of the paper, it is proposed to turn briefly to the Pleadings in the case of the *Aerial Incident of 27th July, 1955 (Israel v. Bulgaria)* (Preliminary Objections).<sup>4</sup> The principal facts which gave rise to the dispute in this case were summed up as follows in the

<sup>1</sup> *Ibid.*, p. 29. The decision of the Court concerning the alternative submission of Switzerland was strongly criticized by several judges. Thus Judge Winiarski stated in his Dissenting Opinion that: 'The Court is not required to consider what was the purpose of the Swiss Government in formulating its alternative claim regarding arbitration and conciliation . . . Here there is no question of the protection of the rights and interests of the national whose cause its Government is espousing; the rights and interests at stake derive directly from international instruments which the States have signed, and to that kind of dispute the rule of the exhaustion of local remedies does not apply.' *I.C.J. Reports*, 1959, p. 83. See also the following statement by Judge Sir Hersch Lauterpacht: 'I cannot accept the contention of the United States that the demand for restitution which forms the subject-matter of the Swiss Application and which, in substance, is now being litigated before the Courts of the United States and the demand by the Swiss Government for arbitration and conciliation are essentially one dispute. . . . An international award may give to a State satisfaction different from restitution of the property seized; a State may have a legal interest, independent of any material compensation and restitution, in vindicating the remedy of arbitration provided for in the Treaty. It may also have a legal interest in having its right to arbitral proceedings determined as soon as possible. . . .' *Ibid.*, p. 120.

<sup>2</sup> *Ibid.*, p. 30.

<sup>3</sup> *Ibid.*, pp. 30-31.

<sup>4</sup> *Ibid.*, p. 127.



Judgment of the Court: 'It was stated to the Court that on the morning of July 27th, 1955, the civil Constellation aircraft No. 4X-AKC, wearing the Israel colours and belonging to the Israel Company El Al Israel Airlines Ltd., making a scheduled commercial flight between Vienna, Austria, and Lod . . . in Israel, having, without previous authorization, penetrated over Bulgarian territory, was shot down by aircraft of the Bulgarian anti-aircraft defence forces.'<sup>1</sup> The first principal submission of both the Israel Application and Memorial sought a declaration of Bulgarian responsibility in international law for the destruction of the aircraft.<sup>2</sup> The claim for pecuniary compensation for the individuals who suffered as a consequence of the shooting down of the aircraft was relegated by Israel to a secondary place. Among the objections put forward by Bulgaria, the one of relevance to us here read, in its final form, as follows: 'Whereas the nationals of Israel whose claims are presented by the Government of Israel have not exhausted the remedies available to them in the Bulgarian Courts before applying to the International Court of Justice . . . the claim of the Government of Israel cannot, at the present stage, be submitted to the Court.'<sup>3</sup> In its pleading before the International Court of Justice, the Government of Israel argued that the case was one of direct injury rather than of diplomatic protection,<sup>4</sup> and relied, for this purpose, not only on the injury itself, but also on the nature of its claim as reflected in its first submission. Israel submitted that the case being based on a direct injury, it was reparable without regard to the position of individuals who may have suffered as a result of the injury. It argued that it is a question of priority<sup>5</sup> whether a case should be regarded as one of direct injury or of diplomatic protection. In this case the injury to the State was said to have preceded both in time and in substance the injury to the individuals. Reparation for the latter injury was considered to be part of the broader satisfaction claimed by Israel and the whole claim and all the submissions were regarded as a unity. The case thus differed from cases of diplomatic protection, in which the injury to the individual precedes the injury to the State and in which the former forms the substance, in fact and in law, of the injury to the State.

<sup>1</sup> Ibid., p. 134. For a fuller statement of the facts see Dissenting Opinion of Judge (ad hoc) Goitein, *ibid.*, p. 195.

<sup>2</sup> Ibid., pp. 129-131.

<sup>3</sup> Ibid., p. 134.

<sup>4</sup> 'The action of the Bulgarian authorities has violated rights which are the intrinsic attribute of Israel as a State, the right that an Israel aircraft going about its lawful business should not be improperly obstructed . . . and certainly not destroyed, in the course of its voyage . . . The State of Israel also has the right . . . to expect that the Bulgarian authorities, as the authorities of any other State through which its aircraft should pass, would comport themselves in accordance with international law and not exceed what is permitted by international law.' Statement of Mr. Rosenne, the Agent of Israel (26 March 1959), *Oral Arguments*, p. 154. See also *ibid.*, pp. 150-5. For the Bulgarian position see *ibid.*, pp. 189-96 (2 April 1959).

<sup>5</sup> This attitude was not contested by the Respondent Government, whose Counsel, Professor Cot, argued instead that Israel gave priority to the claim for pecuniary damages. *Ibid.*, pp. 195-6.

The Court did not find it necessary to go into the question of exhaustion of local remedies, since the case was decided on other grounds.

*The Individual's Link with the Respondent State*

From now onwards, the discussion will be limited to genuine cases of diplomatic protection, to which cases alone the rule of local remedies can be applicable. It is suggested that in international law, no less than in domestic law, it is dangerous and misleading to draw from precedents general conclusions going beyond the specific facts involved in those cases. While it is possible to find the broadest formulations of the rule of local remedies, an examination of the precedents reveals the following common basis of facts: In all of them the injured alien has voluntarily established, or may be deemed to have established, either expressly or impliedly, a link with the State whose actions are impugned. Such a link could be established in a variety of ways which it is not necessary to enumerate here exhaustively. It will suffice to refer to the more common examples. These include cases in which an alien resides, either permanently or temporarily, in the territory of the respondent State, engages there in business, owns there property<sup>1</sup> or enters into contractual relations with the Government of that State.<sup>2</sup> It appears that in all the reported cases which are relevant to the rule of local remedies and in which it was considered necessary that the allegedly wrong-doing State should in the first place be given an opportunity to redress the alleged wrong by means furnished by its own courts, a link of this character did in fact exist.<sup>3</sup>

As Fawcett points out, 'the local remedies rule is really a conflict rule. It is, when properly constructed, a rule for resolving conflicts of jurisdiction between international law and municipal tribunals and authorities; the rule determines when and in what circumstances the local courts, on the one hand, and international tribunals, on the other, must or may assume jurisdiction over the issue'.<sup>4</sup> It is suggested that the voluntary link is

<sup>1</sup> See, in this connexion, the cases in which the International Court of Justice and its predecessor, the Permanent Court of International Justice, considered the rule of local remedies applicable: the *Panevezys-Saldutiskis Railway (Estonia v. Lithuania)*, P.C.I.J., Series A/B, No. 76; *Interhandel (Switzerland v. United States of America)* (Preliminary Objections), I.C.J. Reports, 1959, p. 6.

<sup>2</sup> E.g. *Ambatielos award (Greece v. United Kingdom)*, decided under the Agreement of 24 February, 1956, London, H.M. Stationery Office (1956). See also the type of situation involved in the case of *Certain Norwegian Loans (France v. Norway)*, I.C.J. Reports, 1957, p. 9.

<sup>3</sup> Of course, the idea of 'link' is not strange also in other branches of international law. It has been recognized and resorted to by the International Court of Justice in the *Nottebohm case (Liechtenstein v. Guatemala)* (Second Phase), I.C.J. Reports, 1955, p. 4, and has recently been incorporated in an important multilateral international convention. See Article 5, paragraph 1, of the Convention on the High Seas, adopted in 1958 by the United Nations Conference on the Law of the Sea. *Official Records*, vol. 2 (A/CONF. 13/38), p. 136.

<sup>4</sup> Loc. cit., p. 454.

similar to the connecting factor in private international law.<sup>1</sup> Not only does it confer jurisdiction on the courts of a particular State, but it renders the issue subject to the application of the local law.

The establishment of such a voluntary link appears to have been one of the main—even if often unexpressed—justifications for the local remedies rule. It is thus stated in the *Harvard Research on . . . Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners* that among the several reasons for the rule of exhaustion of local remedies there is: ‘. . . first, [that] the citizen *going* abroad is *presumed* and should ordinarily be required to take into account the means furnished by local law for the redress of wrongs’.<sup>2</sup> A similar idea is expressed by Borchard who says that: ‘The principle of international law by virtue of which the alien is *deemed to tacitly submit* and to be subject to the local law of the State of residence implies as its corollary that the remedies for a violation of his rights must be sought in the local courts.’<sup>3</sup>

Whatever the proper limits to the applicability of the rule of local remedies—which, except for the main questions with which this paper is concerned,<sup>4</sup> it is impossible to discuss here—and however widely the rule has been expressed in decided cases, those cases themselves can only properly be considered as precedents for applying the rule within the limits of the facts and, as pointed out above, all those cases appear to have been based on the fact of the existence of a clearly established link between the alien and the respondent State. There is no authority for applying the rule to such cases of diplomatic protection in which this link is absent. To attempt to do so would be both unjust and unreasonable.

The most common case in which the genuine link exists and the rule of local remedies is applicable is that involving the physical presence in the territory of the wrong-doing State of either the alien or his property. In such a typical case it can be presumed that the link has been properly established. This, of course, is merely a presumption of fact which can be refuted by the circumstances of each specific case. It is in this context that the link theory proves to be particularly helpful. It not only helps us to understand why the rule of local remedies would be applicable to the case of a contractual relationship between a State and a non-resident alien, but

<sup>1</sup> See generally, Dicey, *Conflict of Laws* (7th ed., 1958), pp. 41 et seq.

<sup>2</sup> Loc. cit., pp. 152–3. Italics added.

<sup>3</sup> *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (1915), p. 817. Italics added. See also the well-known *Salem* case (*United States v. Egypt*), in which the Arbitral Tribunal stated that ‘As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did *choose his residence*. . .’. *R.I.A.A.*, 1932, vol. 2, p. 1202. Italics added. See also Moore, *A Digest of International Law* (1906), vol. 6, pp. 658, 660.

<sup>4</sup> This paper is not concerned with non-availability of local remedies or other instances of denial of justice.



is also essential for the necessary exclusion of the applicability of the rule in the case of an alien who, although present in person in the territory of the respondent State, has not established a genuine link between himself and that State. Surely the rule of local remedies is applicable to the case, for instance, of an alien who built a factory in a State, which factory is expropriated by that State without compensation. No question could legitimately be raised as to the existence of the genuine link in such a case. But let us consider the case in which the injured alien came to be in a certain State against his will, for instance, if he was brought there against his will and in violation of international law from the territory of another State or from the high seas by the agents of the former State, or, if his yacht travelling through an international waterway within the limit of the territorial waters of that State was destroyed by a mine illegally planted there by the armed forces of the territorial State. As in neither case a genuine link had been established, there would be no justification for the applicability of the local remedies rule.

The link theory was relied upon by Israel in the case already mentioned of the *Aerial Incident of 27th July, 1955*.<sup>1</sup> While the principal Israel argument regarding the non-applicability of the local remedies rule to that case<sup>2</sup> rested on the theory that its claim was founded on a direct injury caused by Bulgaria to Israel in its quality as a State, and not on the exercise of the right of diplomatic protection of its citizens abroad, the pleading went on to add that even on the basis of the Bulgarian thesis, according to which the injury had not been caused to Israel in its quality as a State, the rule of local remedies could not be applicable. Basing itself on the facts of the case as stated in its Memorial, and relying on the link theory, Israel argued that

'There is no link of any kind between any of the victims and any of the individual claimants and the Bulgarian State. The victims of the Bulgarian action had no voluntary, conscious and deliberate connection with Bulgaria. To the contrary. Such connection as they did have, if such it can be called, was involuntary, unknown and completely unpremeditated. They were concerned with 4X-AKC and its journey to Lod. They constituted an integral whole with 4X-AKC on that voyage. Their death was the result of the unlawful interference with 4X-AKC in the course of that voyage.'<sup>3</sup>

It is also suggested that according to general principles of law, it would be very strange indeed if a State which interfered illegally with an alien, who did not—except for that interference—have any connexion with it, should be allowed to derive any advantage from its illegal acts.

<sup>1</sup> For the Bulgarian argument that the 'link' theory has no basis in international law see statement by Professor Cot (2 April 1959), *Oral Arguments*, p. 189.

<sup>2</sup> See also above, p. 92.

<sup>3</sup> Statement of Mr. Rosenne (26 March 1959); *Oral Arguments*, p. 156. As mentioned above, the Court did not consider the question of exhaustion of local remedies. See *I.C.J. Reports*, 1959, p. 127.

Admittedly there may be border-line cases in which difficult questions of fact<sup>1</sup> and of law would arise regarding whether the circumstances support the existence of the genuine link. These difficulties, however, are not unsurmountable and to resolve them would be the function and the duty of the litigants and of the international tribunal. On the whole, the link theory—with all the difficulties which border-line cases may involve—is preferable to a rigid application of the local remedies rule to cases of diplomatic protection, a course of action which, in cases where a genuine link is absent, may lead to a travesty of justice.<sup>2</sup>

The link theory can be of importance also in another way. As it is well known, the law of State responsibility developed in close connexion with the practice of diplomatic protection of citizens abroad.<sup>3</sup> It has been concerned principally with injuries suffered by aliens within the territory of the respondent State.<sup>4</sup> Thus, it is understandable that the full title of the *Harvard Research* of 1929 reads: 'The Law of Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners'.<sup>5</sup> The rule of local remedies developed in connexion with the alien who, of his own volition, either came to be in a foreign country, or established some other relationship with it, for instance by lending money to its Government. In view of the genuine link which undoubtedly existed in such cases, it was considered both just and necessary that local remedies available in that State should be exhausted by the alien before any international proceedings could be instituted against it by the State of which he was a national.

Today the position is different. The law of State responsibility appears to be broad enough to cover cases of injuries inflicted in violation of international law by one State upon nationals of another State who are outside the territory of the former.<sup>6</sup> It is probably thus that what at one time were

<sup>1</sup> E.g. the question whether a foreign vessel was fishing within or without the territorial waters of a State.

<sup>2</sup> It is suggested that no genuine link can be established, not only when such connexion as there may be between the alien and a State was established by the wrongful act of the latter—which act is subsequently impugned in international proceedings—but also when an alien has been driven into that State's territory by *force majeure*, for instance, if his ship or aircraft has been forced by an irresistible storm and winds to cross the frontier. In a different connexion, regarding the entry through *force majeure* of a foreign vessel into the territorial waters of a State, and the resulting immunity of the former from the jurisdiction of the latter, see Briggs, *op. cit.*, p. 354.

<sup>3</sup> See generally de Visscher, *Theory and Reality in Public International Law* (1957), Corbett's translation, pp. 269–86.

<sup>4</sup> See also Meron, 'Some Reflections on the Status of Forces Agreements in the Light of Customary International Law', in the *International and Comparative Law Quarterly*, 6 (1957), p. 689, at p. 691.

<sup>5</sup> *Loc. cit.*, p. 133.

<sup>6</sup> Typical of the modern concept of State responsibility are the lectures of Professor Freeman delivered in The Hague Academy of International Law on 'Responsibility of States for Unlawful Acts of their Armed Forces', *Recueil des Cours*, 88 (1955) (ii), p. 267. Professor Freeman discusses not only responsibility of the State for injuries caused by its armed forces to an alien in its territory, but also the responsibility of the State for unlawful acts of its forces abroad.

'local' remedies to be exhausted in the State in which the alien suffered injuries, came to be commonly considered as equivalent to the 'legal' remedies to be sought by the alien in the courts of the respondent State, regardless of where the injury may have been caused, or whether a link had been established between him and that State. This broadening of the law of State responsibility<sup>1</sup> is an important reason for the re-examination of both the basis and the scope of the rule of local remedies. Surely it would be unreasonable to refer individuals injured by a foreign State outside its territory to its courts as a condition precedent to the institution of international proceedings by the State of which the victim was a national; and this, despite the absence of a genuine link between the injured individual and the respondent State.<sup>2</sup>

In connexion with the 'dis-localization' of the local remedies rule, and the extension of the rule to cases in which the injured individual is not present in the territory of the respondent State, reference may be made to the Pleadings of the Parties in the case of *Certain Norwegian Loans (France v. Norway)*. In its Reply, the Government of France sought to establish that the rule of exhaustion of local remedies can be applicable only to cases in which the injured alien of his own volition entered and established his residence in the territory of the wrong-doing State. The French Government argued that the fact that the rule of local remedies is as frequently, or

See also Garcia Amador, 'Second Report on State Responsibility, U.N. Doc. A/CN.4/106', *Yearbook of the International Law Commission* (1957), vol. 2, chapter i, paras. 6-7, and chapter ii, Article 3.

<sup>1</sup> Note the broad conception of the local remedies rule in the Separate Opinion of Judge Córdova in the *Interhandel* case: 'A State may not even exercise its diplomatic protection, and much less resort to any kind of international procedure of redress until its subject has previously exhausted the legal remedies offered him by the State of whose action he complains.' *I.C.J. Reports*, 1959, p. 46. See also the following statement by Professor Bourquin in the case of *Certain Norwegian Loans*: 'Quel est l'objet de cette règle? Lorsqu'un Etat s'est plaint d'un acte internationalement illicite, imputé à un Etat étranger et dont la victime est une personne privée, son action sur le plan international n'est recevable que si la personne lésée a préalablement épuisé les voies de recours que le droit interne de l'Etat incriminé met à sa disposition.' *Pleadings, Oral Arguments, Documents*, vol. 2, p. 156. Compare the more limited statement of the Court in the *Interhandel* case: 'the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State *where the violation occurred* should have an opportunity to redress it by its own means. . . .' *I.C.J. Reports*, 1959, p. 27. Italics added.

<sup>2</sup> The unreasonableness of such a course of action may be illustrated by two hypothetical cases: (a) Radiation released by a hydrogen bomb exploded in State A by the Government of that State causes damage to the inhabitants of a village in the neighbouring State B. Even if the possible violation of the territorial sovereignty of State B were disregarded and the case dealt with as a straight case of diplomatic protection, it is suggested that the institution of international proceedings by State B against State A would not be dependant upon prior exhaustion by the victims of the legal remedies available in the latter State. Compare *Trail Smelter case (United States v. Canada)*, *R.I.A.A.*, 1935, vol. 3, p. 1907. (b) Nationals of State A are injured by the naval forces of State B on the high seas in circumstances involving the international responsibility of State B. It appears that the institution of international proceedings by State A against State B would not depend upon the exhaustion of local remedies in State B by the victims.



even more frequently, referred to as 'épuisement des recours locaux' as it is referred to as 'épuisement préalable des recours internes', indicates 'une nuance qui touche au fond même de cette règle, à sa justification'.<sup>1</sup> In support of this, the French Government relied on the views of certain authorities on the law of State responsibility, who justify the subjection of the alien to the local jurisdiction by the fact that he has voluntarily chosen to establish his residence in that State and that by entering a certain country, the alien is deemed to have taken into account the local law. The French Government concluded that

'la seule explication de la règle réside dans l'exigence qu'un étranger qui se trouve en litige avec l'Etat sous la souveraineté duquel *il a voulu vivre* ne puisse provoquer le transfert de son affaire sur le plan international sans avoir épuisé au préalable tous les moyens de la régler par les voies locales'.<sup>2</sup>

In its Rejoinder, the Government of Norway argued, *inter alia*, that practice did not support the French thesis and relied mainly on the well-known arbitral awards in the *Finnish Shipowners*<sup>3</sup> and the *Ambatielos*<sup>4</sup> cases, in which the rule of local remedies was held to be applicable despite the fact that the individual claimants did not reside in the respondent State.

The Court, in the *Norwegian Loans* case, did not find it necessary to go into the question of the exhaustion of local remedies, since the case was decided on other grounds. The only reference to the argument of the parties regarding the above-mentioned issue was made by Judge Read in the course of his Dissenting Opinion. Judge Read stated that 'France has not been able to put forward any persuasive authority . . . and, indeed, the weight of authority is the other way'.<sup>5</sup>

It is submitted that while France, in discussing the basis for the local remedies rule, stressed quite correctly the voluntary character of the relationship between the injured individuals and the respondent State, it appears that she gave too limited a definition to the rule. The relationship between the injured individual and the respondent State must certainly be of a voluntary character. But this does not mean that establishment of residence is necessarily the only way in which the link can be established. It surely can be, and indeed often is established in other ways. For apt illustrations, reference can again be made to the *Norwegian Loans* case in which the Norwegian Government relied on the *Finnish Shipowners* arbitration, and on the *Ambatielos* case in order to refute the French thesis. In the first case,<sup>6</sup> the ships which were requisitioned had sailed into territory

<sup>1</sup> *Pleadings, Oral Arguments, Documents*, vol. 1, p. 408.

<sup>2</sup> *Ibid.*, 1934. Italics added.

<sup>3</sup> *R.I.A.A.*, vol. 3, p. 1481.

<sup>4</sup> See Award of 6 March 1956, H.M. Stationery Office (1956).

<sup>5</sup> *I.C.J. Reports*, 1957, p. 97.

<sup>6</sup> It should be noted that the *Finnish Shipowners* case was also relied upon heavily by the

of Great Britain as a result of the voluntary act of their owners. In the second case, a contractual relationship had been established between Ambatielos and the Government of Great Britain. The existence of the proper link in either case cannot be denied.

### Conclusions

In the foregoing pages an attempt has been made to indicate some limitations on the incidence of the rule of exhaustion of local remedies. The conclusions may now be summarized.

In principle, that rule is not applicable to all cases of State responsibility, but only to cases of diplomatic protection in which the State espouses the cause of its national and is proceeding in virtue of the right of diplomatic protection. The applicability of the rule to cases of direct injury caused by one State to another is precluded by the maxim *par in parem non habet imperium, non habet jurisdictionem*. Therefore it becomes necessary to classify each case as one of diplomatic protection or one of direct injury. Since it is common for elements of diplomatic protection and of direct injury to appear in one and the same case, and since it is necessary to maintain the unity of the claim and not to split it into its constituent elements, the classification of the case as pertaining to one of the above-mentioned categories must follow the preponderant elements. In the process of classification regard must be had to the subject of the dispute and the nature of the claim. What matters regarding both these factors is not so much their formulation by the interested party as the judicial appreciation of their true substance.

Even from the classification of the case as one of diplomatic protection it does not necessarily follow that it must always be subject to the exhaustion of the local remedies rule. The very fact of the injury caused by a State to an alien does not inevitably render the latter subject to the jurisdiction of the former as a condition precedent to the exercise of diplomatic protection by his national State. The State may not be allowed to derive an advantage from its own wrong. Even before the question of the availability of local remedies arises, it must be considered whether, apart from the injury, the relationship between the injured individual and the respondent State

respondent Government in the case concerning the *Aerial Incident of 27th July, 1955 (Israel v. Bulgaria)*, see *Oral Arguments*, p. 71. For the reply of Israel see *ibid.*, pp. 214-15. The *Finnish Shipowners* arbitration is often regarded as an important authority for the question when local remedies must be exhausted. It is submitted that the case may not be so regarded, because the only issue decided by the arbitrator was whether the shipowners, who had themselves instituted proceedings in the appropriate domestic tribunal of Great Britain, had in fact exhausted the remedies available to them in that country. Having found that the local remedies had in fact been exhausted, the arbitrator did not consider the second question submitted to him, namely, whether the non-exhaustion of local remedies would have constituted an obstacle to the institution of international proceedings by the Government of Finland.

justifies the applicability of the rule. It has been suggested that in order to render the rule of local remedies applicable, it is necessary for the alien to have voluntarily established some link (e.g. by residence or contract) with the State whose actions are impugned. This link is not unlike the connecting factor in private international law. It renders the injured individual subject to the jurisdiction of the tribunals of the respondent State and to its law. The link theory offers a much-needed limitation of the incidence of the local remedies rule. The rule must be applied with caution, and only after all the facts of the case have been adequately considered. Not only is a rigid application of the rule to all cases of diplomatic protection not supported by either the reasons for the rule or by the practice, but it also does not serve the interests of justice.





# THE 1958 GENEVA CONVENTION ON THE CONTINENTAL SHELF<sup>1</sup>

By J. A. C. GUTTERIDGE

## *Introduction*

THE term 'continental shelf' was not used by earlier generations of international lawyers, and its emergence in a juridical context<sup>2</sup> was precipitated by the Truman Proclamation of 28 September 1945.<sup>3</sup>

This is not, of course, to say that, up to that date, problems which have since then been discussed by international lawyers in the context of the continental shelf were completely ignored. The question of the ownership of the sea-bed and subsoil had, from the time of Vattel onwards, engaged the attention of writers on international law. In general,<sup>4</sup> the sea-bed and subsoil of the high seas were regarded as being capable of occupation as *res nullius*, provided such occupation did not derogate from the principle of the freedom of the seas. For very many years, it has been the practice of States to exploit, in different ways, the natural resources of the sea-bed and the subsoil, for example, by carrying on sedentary fisheries or by the tunnelling of mines that ran out from the coast under the sea. It was not, however, until advances in science and technology had made it possible to exploit the oil-bearing strata of the continental shelf that the question of the nature of the rights which a coastal State possessed in relation to the continental shelf adjacent to its territory became a matter of urgent importance. The first instance of an international agreement between States 'to define . . . their respective interests' in the submarine areas adjacent to their coasts is the Treaty of 26 February 1942 between the United Kingdom and Venezuela relating to the submarine areas of the Gulf of Paria.<sup>5</sup> The treatment of those submarine areas in the Treaty appears to have been based on the view which had so long prevailed that

<sup>1</sup> © J. A. C. Gutteridge, 1960. The writer was herself a member of the United Kingdom Delegation at the 1958 Conference on the Law of the Sea, but the views expressed in this article are her personal ones.

<sup>2</sup> The term 'continental shelf' appears first to have been used in a geological and geographical context in 1887. Mouton, *The Continental Shelf* (The Hague, 1952), p. 6.

<sup>3</sup> The text of this proclamation is to be found in *Regulations on the Régime of the High Seas* (United Nations, New York 1951), vol. 1, pp. 38-39.

<sup>4</sup> Mouton (op. cit., pp. 144-56) considers that in the case of sedentary fisheries the rights claimed and exercised were based on prescription rather than occupation, and were in the nature of property rights. Examples of such fisheries are the pearl and chank fisheries in the Gulf of Manaar claimed by the Portuguese, Dutch and British successively.

<sup>5</sup> *United Kingdom Treaty Series* No. 10, (1942).

the sea-bed lying beyond the limits of territorial waters was *res nullius* over which sovereignty could be acquired by occupation.<sup>1</sup> The term 'continental shelf' is not used in that Treaty but the 'submarine areas of the Gulf of Paria' are defined in the Treaty as 'the sea-bed and sub-soil outside of the territorial waters of the High Contracting Parties to one or the other side' of certain lines drawn as provided in the following articles.<sup>2</sup> The Treaty provides (in Article 6) that nothing therein shall be held to affect in any way the status of the waters of the Gulf of Paria or any rights of passage or navigation on the surface of the seas outside the territorial waters of the Gulf of Paria.

The Truman Proclamation of 1945 declared that 'the Government of the United States regards the natural resources of the subsoil and the seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States' and 'subject to its jurisdiction and control'. The Proclamation itself did not attempt to define the expression 'continental shelf' by any reference to the depth of the superjacent waters.<sup>3</sup> In some of the other unilateral instruments which followed the Truman Proclamation there was, however, a reference to the depth criteria.<sup>4</sup> In geological terms it is possible to give a definition of the continental shelf, but even then problems are presented by the irregularities of the topography of the shelf, and of the isolated submarine rises therein.<sup>5</sup> The depth of the edge of the continental shelf, in the geological meaning of that term, varies considerably from less than 100 metres to more than 300 metres, and the traditional depth limit of

<sup>1</sup> F. A. Vallat in this *Year Book*, 23 (1946), p. 334.

<sup>2</sup> The United Kingdom followed up the Treaty by the Submarine Areas of the Gulf of Paria (Annexation) Order, 1942 (S.R. & O. 1942, vol. 1, p. 919) under which the sea-bed and subsoil situated beneath waters bounded as defined in the Order were 'annexed to and formed part of His Majesty's dominions' and 'attached to the Colony of Trinidad and Tobago for administrative purposes'.

<sup>3</sup> In the Press release which accompanied the Proclamation it was stated that the continental shelf is generally considered to be the submerged land which is contiguous to the continent and which is covered by no more than 100 fathoms (600 feet) of water.

<sup>4</sup> The Proclamation issued by the President of the Mexican Republic on 29 October 1945 claimed the whole of the 'continental platform' adjacent to the coasts of Mexico, and described the platform as being bounded 'by a line joining points of equal depth (200 metres)'.

<sup>5</sup> The difficulties of arriving at an acceptable geological definition are discussed by Mouton, *op. cit.*, pp. 6-12. The same problem is also discussed in a paper on *Scientific Considerations Relating to the Continental Shelf*, a Memorandum prepared by the Secretariat of U.N.E.S.C.O. (A/CONF.13/2) which was one of the preparatory documents available to the 1958 Conference. On page 4 of this Memorandum there is quoted a definition of the 'Continental Shelf, shelf edge and Borderland' adopted by the International Committee on the Nomenclature of Ocean Bottom Features. This reads as follows: 'The zone around the continent, extending from the low-water line to the depth at which there is a marked increase of slope to greater depth. Where this increase occurs, the term shelf edge is appropriate. Conventionally, its edge is taken at 100 fathoms, or 200 metres, but instances are known where the increase of slope occurs at more than 200 or less than 65 fathoms. When the zone below the low-water line is highly irregular, and includes depths well in excess of those typical of continental shelves, the term continental borderland is appropriate.'



200 metres cannot properly be regarded as an average one;<sup>1</sup> furthermore, the term 'continental shelf' is, strictly, limited to submarine areas up to the point at which there is a marked increase of slope to greater depths. Beyond that point and before the descent to oceanic depths, the submarine area is properly known as the 'continental slope'.

The Truman Proclamation of 1945, and the subsequent unilateral instruments, are all based on the assumption that the coastal State can claim to exercise rights over the continental shelf adjacent to its territory. Even a cursory study of these unilateral instruments will, however, disclose different concepts of the nature and extent of these rights, and the consequences of their assertion. The Truman Proclamation itself, six Orders in Council made between 1948 and 1954 under the Colonial Boundaries Act, 1895,<sup>2</sup> and a number of Proclamations made by the Rulers of British Protected States in the Persian Gulf all relate to the continental shelf and have one common feature. They all assert, in varying terms, that nothing in the instrument in question shall be deemed to affect the status as high seas of the waters above the sea-bed and outside territorial waters. In contrast, the declarations and decrees made by various South American States assert the sovereignty of the State concerned over the shelf, and whilst they may recognize freedom of navigation over the shelf, they make no reservation of the character, as high seas, of the superjacent waters. The Argentine Declaration of 9 October 1946, for instance, declares that 'the Argentine Epicontinental Sea and Continental Shelf are subject to the sovereign power of the Nation', and only adds that 'for purposes of free navigation, the character of the waters situated in the Argentine Epicontinental Sea and above the Argentine Continental Shelf, remains unaffected by the present Declaration'.<sup>3</sup> This considerable divergence of view as to the nature and extent of the rights of the coastal State over the continental shelf was reflected at the 1958 Geneva Conference, and despite the assertions of a number of delegates that customary international law already provided the legal criteria for regulating the problems of the continental shelf the legal position was, up to 1958, far from certain.<sup>4</sup> What, however,

<sup>1</sup> A/CONF.13/2, p. 7.

<sup>2</sup> These Orders were made in respect of the continental shelves appurtenant to: The Bahamas (S.I. 1948, No. 2574); Jamaica (S.I. 1948, No. 2575); British Honduras (S.I. 1950, No. 1649); Falkland Islands (S.I. 1950, No. 2100); British Guiana (S.I. 1954, No. 1372); North Borneo (S.I. 1954, No. 839).

<sup>3</sup> The Declaration was followed on 11 October 1946 by a Decree (No. 14, 708) in similar terms, the text of which is to be found in *Laws and Regulations on the Régime of the High Seas*, vol. 1, p. 5. The extent of the 'epicontinental sea' is not defined. It appears, however, from the Preamble to the Declaration that 'the waters covering the continental platform' were deemed to constitute 'the epicontinental seas'. See Mouton, *op. cit.*, pp. 74-75.

<sup>4</sup> In the arbitration between *Petroleum Development (Trucial Coast) Ltd. and the Ruler of Abu Dhabi*, the Umpire (Lord Asquith of Bishopstone) referred to the draft Articles on the Continental Shelf contained in the *International Law Commission's Report* of its third session

can justifiably be said is that both the practice of States for the ten years preceding the Conference and the writings of jurists during that period made it impossible to gain any support at the Conference for the contention that the continental shelf was *res communis* or for the proposition that the coastal State had no rights over the continental shelf beyond the outer limits of its territorial sea.

These contentions were specifically rejected by the International Law Commission in their commentary on Article 68 of their draft Articles on the Law of the Sea. The Commission said, in particular, that 'once the seabed and the subsoil have become an object of active interest to coastal States, with a view to the exploration and exploitation of their resources, they cannot be considered as *res nullius*, i.e. capable of being appropriated by the first occupier'.<sup>1</sup> The Commission, therefore, whilst also rejecting a possible charge 'of giving the authority of a legal rule to a multilateral practice resting solely upon the will of the States concerned', as expressed in the Truman Proclamation of 1945 and the other unilateral instruments which followed that Proclamation, considered this practice itself to be supported by considerations of law and of fact. The Commission's draft Articles on the continental shelf (Articles 67 to 73) sought to embody in rules of law certain elements in that practice, and were therefore in the nature of *lex ferenda*. The Fourth Committee of the 1958 Geneva Conference, in taking these articles as the basis of their work, were fully conscious that the task of this Committee lay in the sphere of the progressive development of international law, rather than of its codification. A detailed study of the work of the Fourth Committee has been made by Miss Whiteman,<sup>2</sup> and it is not the present writer's intention to tread exactly in the footprints of her learned colleague, but rather to discuss under several broad headings the legal considerations underlying the work of the 1958 Conference in drawing up the Convention on the Continental Shelf,<sup>3</sup> and to consider how far the resulting Convention on the Continental Shelf, adopted on 26 April 1958, by 57 votes in favour,

and said 'These draft Articles have been prayed in aid by the Claimants with the implication that they are or are intended to be the expression of principles which are already part of international law, not merely of principles which ought to, or might with advantage form part of that law in future. If this is indeed the contention of the claimants I am of opinion that it is ill-founded.' The Truman Proclamation itself did not purport to be based on any recognized and established rule of international law but on what was reasonable and just. The reasons for the issue of the Proclamation were primarily economic; see Vallat, *op. cit.* (1946), p. 334.

<sup>1</sup> *Report of the International Law Commission covering the work of its Eighth Session—23 April–4 July 1956*, Official Records, Eleventh Session, Supplement No. 9 (A/3159), pp. 42–43.

<sup>2</sup> 'Conference on the Law of the Sea: Convention on the Continental Shelf', *American Journal of International Law*, 52 (1958), pp. 629–53.

<sup>3</sup> The text of this Convention, and of each of the other three 1958 Geneva Conventions on the Law of the Sea, is to be found in *Report on the First United Nations Conference on the Law of the Sea*, Miscellaneous No. 15 (1958), Cmnd. 584.

3 against and 8 abstentions,<sup>1</sup> has made a substantial contribution to the progressive development of international law.

### *Definition of the Continental Shelf*

Article 1 of the 1958 Convention on the Continental Shelf provides that for the purposes of the Convention 'the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coasts but outside the area of the territorial sea to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands'. Except for the inclusion in the definition of the reference to islands, and one or two minor drafting changes, this wording is exactly the same as that of Article 67 of the International Law Commission's draft Articles on the Law of the Sea.

This must not, however, be taken to imply that Article 67 of the International Law Commission's draft was not subjected to criticism by the Fourth Committee of the 1958 Geneva Conference. Its 13th to 19th Meetings were, indeed, exclusively devoted to consideration of that definition. The Canadian delegate on the Fourth Committee, in the course of the general discussion which preceded the detailed consideration of the individual articles,<sup>2</sup> pointed out that there were five possible methods of defining the continental shelf, none of which, taken separately, appeared to provide a completely satisfactory definition of the continental shelf. The first method would be to lay down an agreed distance from the coast in terms of miles or kilometres, but this method bears no real relationship to geographical or geological facts or to the realities of the situation with regard to exploitation.<sup>3</sup> The second method would be 'to define the continental shelf by the geological characteristics of the seabed or by the type of aquatic inhabitants found there'. This method was considered, by the authors of the memorandum submitted by the Secretariat of U.N.E.S.C.O.,<sup>4</sup> but was rejected by them on the grounds that the continental margins did not have the same origin and consequently differed widely in structure and in the types of living organisms they supported. The third method would be to fix the limit of the continental shelf in terms of depth, the commonly suggested figure being 200 metres (approximately 100 fathoms).<sup>5</sup> The

<sup>1</sup> The three opposing votes were cast by Belgium, the Federal Republic of Germany and Japan.

<sup>2</sup> A/CONF.13/42, pp. 29-30.

<sup>3</sup> A proposal embodying the idea of a limitation by distance from the shore was put forward by the Yugoslavian delegation (A/CONF.13/C4/212), but was rejected by the Fourth Committee.

<sup>4</sup> A/CONF.13/2.

<sup>5</sup> The edge of the continental shelf, in its geological sense, is far from following the 200 metre line everywhere. The figure of 200 metres does not accurately represent an average of the different depths of the edge, the real average being nearer to 133 metres (A/CONF.13/2, p. 7).



fourth criterion was that of possible exploitation; this the Canadian delegate, in common with a number of other delegates, criticized as being insufficiently objective, and also open to the objection that technical and scientific knowledge was increasing so rapidly that a limit thus defined would tend to expand continuously, thus creating much uncertainty. The fifth possible method would be to fix the boundary of the continental shelf at an actual edge in a geographical sense; this, however, presented a difficulty in that the physical edge of the shelf was not always well defined.<sup>1</sup>

The definition adopted by the International Law Commission was a combination of the third and fourth methods referred to above. As the successive reports of the International Law Commission show, the Commission had experienced considerable difficulty in arriving at a definition which they considered to be satisfactory.<sup>2</sup> At their third session in 1951 they had adopted the sole criterion of exploitability;<sup>3</sup> at their fifth session in 1953 they abandoned this criterion in favour of a depth of 200 metres having come 'to the conclusion that the text previously adopted lacked the necessary precision and might give rise to disputes and uncertainty'. At this time also the Commission considered that 'the adoption of a fixed limit would have considerable advantage, in particular with regard to the delimitation of continental shelves between adjacent States or States opposite each other'. At its eighth session in 1956 the Commission reintroduced the criterion of exploitability, but linked it to a criterion based on depth. This double criterion corresponded to that set forth in a conclusion recorded at the Inter-American Specialized Conference on Conservation of Natural Resources: The Continental Shelf as Marine Waters, held at Ciudad Trujillo in March 1956.<sup>4</sup> It is, however, obvious that the decision of the Commission to maintain the limit of a depth of 200 metres, but to add to it words which would give the coastal State authority to exploit the

<sup>1</sup> A/CONF.13/2, pp. 7-8. One example given is that of the Arabian shelf in the Red Sea, 200 kilometres south of Jidda, which is only 50-80 metres deep, and which suddenly drops off beyond this with a very sharp discontinuity of slope to depths of 640-730 metres.

<sup>2</sup> The successive stages in the International Law Commission's formulation of a definition of the continental shelf are summarized in the *Report of the Commission's Eighth Session* (A/3159, p. 41).

<sup>3</sup> In putting forward the criterion of 'technical possibilities' at the 67th meeting of the International Law Commission (A/CN.4/SR.67), Mr. Manley Hudson considered that exploitation became impossible beyond a depth of 200 metres.

<sup>4</sup> The Resolution adopted reads as follows:

'1. The sea-bed and subsoil of the continental shelf, continental and insular terrace, or other submarine areas, adjacent to the coastal state, outside the area of the territorial sea, and to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the sea-bed and subsoil, appertain exclusively to that state and are subject to its jurisdiction and control.' (Resolution I, Final Act, Inter-American Specialized Conference on 'Conservation of Natural Resources: The Continental Shelf as Marine Waters', signed 28 March 1956, p. 13.)

This text had its origin in a proposal of the Dominican Republic, which without directly defining the continental shelf, would have given control over its soil and subsoil 'up to a limit in which these operations (exploration and development) can be efficiently and effectively extended'.

natural resources of areas beyond this depth should this prove practicable, was not reached without difficulty: 'In the opinion of certain members [of the Commission] this addition would . . . have the advantage of not encouraging the belief that up to 200 metres depth there is a fixed zone where rights of sovereignty other than those stated in Article 68 . . . can be exercised.' Other members contested the usefulness of the addition which in their opinion 'unjustifiably and dangerously impaired the stability of the limit adopted'.<sup>1</sup>

During the general debate in the Fourth Committee the French delegate criticized this double criterion as 'a concept lacking in constancy, uniformity and certainty'.<sup>2</sup> The United Kingdom delegate considered this criterion to be open to serious criticism on the grounds of uncertainty,<sup>3</sup> and those views were echoed by a number of other delegates when detailed consideration of Article 67 of the International Law Commission's draft followed the general debate.

The efforts of the Fourth Committee of the Conference to find a satisfactory alternative definition resulted in failure; none of the alternatives proposed received a sufficient majority, and the draft definition presented by the Fourth Committee (which, as already pointed out, is substantially that adopted by the International Law Commission at their Eighth Session in 1956) was the one which now appears as Article 1 of the Convention on the Continental Shelf. It is worth briefly examining some of the alternatives suggested, and the probable reasons for their failure.

The simplest of the alternatives proposed was that suggested in two separate proposals by the French and Lebanese delegations,<sup>4</sup> and consisted in the elimination from the definition of the concept of exploitability. This did not satisfy a number of delegates who believed that technical advances might, in the foreseeable future, permit exploitation beyond that depth.<sup>5</sup> It also did not satisfy those delegations who pointed out that in certain cases there were narrow troughs or channels immediately off the coast of a depth greater than 200 metres separating parts of the continental shelf in its strict geological sense from other parts or from the mainland and that these ought, for the purposes of the Convention, to be considered as part of the continental shelf.<sup>6</sup>

<sup>1</sup> A/3159, p. 41.

<sup>2</sup> A/CONF.13/42, p. 2.

<sup>3</sup> Ibid., p. 4.

<sup>4</sup> A/CONF.13/C4/L7 and A/CONF.13/C4/L8.

<sup>5</sup> The possibilities of exploration and exploitation beyond that depth are considered in a paper (A/CONF.13/25) on *Recent Developments in the Technology of Exploiting the Mineral Resources of the Continental Shelf* prepared by Dr. Mouton, which was one of the documents prepared for the use of the Conference.

<sup>6</sup> These troughs, which are normally parallel to the general direction of the coast, are features of glaciated shelves, e.g. off the coast of Norway. In the Memorandum prepared by the Secretariat of U.N.E.S.C.O. it was suggested that the depressions in the Norwegian shelf ought not to be disassociated therefrom because they form an integral part of the shelf from the morphogenetic point of view (A/CONF.13/2, p. 15).

A series of more complicated proposals were introduced by the United Kingdom and Netherlands delegations.<sup>1</sup> The underlying intention of these proposals was to relate the criterion of the depth of the superjacent waters to a limitation on the exercise by the coastal State of its rights to explore and to exploit the natural resources of the shelf. This intention was, perhaps, brought out most clearly in the revised proposal submitted by the Netherlands on 26 March 1958, which reads as follows:

'The coastal State exercises exclusive rights for the purposes of exploring and exploiting the natural resources of its continental shelf. These rights are not subject to any limitation when the method of tunnelling or directional drilling from terra firma . . . is used, but are limited to a depth of 550 metres of superjacent waters when drilling devices working on or in the high seas are used.'

The figure of 550 metres which is referred to in the above proposal, and in the other proposals made by the United Kingdom and Netherlands, was an estimate of the greatest depth at which exploitation was likely to be possible in the foreseeable future. It also corresponds, approximately, to the edge of the continental slope. It has to be admitted, however, that these proposals were all open to the substantial criticism of failing to provide a satisfactory juridical definition of the expression 'continental shelf'.<sup>2</sup>

An attempt to provide a juridical definition of the continental shelf on a geological basis was made in a proposal submitted by the Panamanian delegation.<sup>3</sup> It had the merit of attempting to cover both the continental shelf proper and the continental slope 'with its gorges, valleys, depressions and ravines' but it was still open to the criticism of uncertainty since it provided that the continental shelf as so defined extended 'to the furthest points at which the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas of the continental slope, but excluding the great depths of the oceanic basins'.

The idea of a limitation expressed in terms of a greater depth than 200 metres, which is to be found in the United Kingdom and Netherlands proposals referred to above, were expressed in a revised proposal for Article 67 submitted by the Canadian delegation who proposed the shelf

<sup>1</sup> A/CONF.13/C4/L24 (Rev. 1); A/CONF.13/C4/L19; A/CONF.13/C4/L19 (Rev. 1).

<sup>2</sup> In a proposal for a revised text of Article 68 submitted on 21 March 1958 (A/CONF.13/C4/L24 (Rev. 1)), the United Kingdom delegation substituted for the expression 'the continental shelf' the expression 'the submarine areas adjacent to [the] coast but outside the territorial sea', thus reverting to the expression 'submarine areas' used by the International Law Commission in the *Report of its Second Session, 5 June-29 July, 1959* (A/1316). In explaining why the United Kingdom were proposing that the term 'continental shelf' should not be used at all, the United Kingdom delegate drew attention to the difficulty disclosed in the general debate in the Fourth Committee of reconciling any definition of the term 'continental shelf' suitable for the purposes of the draft Convention with the geological definition adopted by the International Committee on the Nomenclature of Ocean Bottom Features (above, p. 103, n. 5); A/CONF.13/42, pp. 35-36.

<sup>3</sup> A/CONF.13/C4/L4.



edge of 550 metres as the criteria<sup>1</sup> and by the Indian delegation in a revised proposal<sup>2</sup> which read as follows:

'For the purposes of these articles, the term "continental shelf" is used as referring to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, extending so far as the sea-bed is concerned to a depth of 550 metres of the superjacent waters.'

The limitation referred to in the Indian proposal, it will be noted, relates only to the sea-bed: the reason for that was the same implied in the Netherlands proposal quoted above, i.e. that the limitation is required in respect of installations and other devices operating in or on the sea-bed. Both the United Kingdom and Netherlands delegations supported this Indian proposal and withdrew their own proposals in favour of it. The Indian proposal was, however, rejected by 31 votes to 21 with 16 abstentions, and was not reintroduced at the Plenary Session of the Conference. In the opinion of the present writer the failure of this proposal is greatly to be regretted, since its adoption would have enabled the outward limit of that submarine area over which a coastal State has 'sovereign rights' for the purpose of exploration and exploitation to be ascertained. The present definition is bound to result in uncertainty; and may lead to disputes between States in cases where the same continental shelf is adjacent to the territories of opposite or adjacent States, or, at the least, to difficulties in fixing by agreement the boundaries of such shelves. Moreover, 'exploitability' is a subjective criterion. It may well be asked, as it was asked at the Conference, how it is to be determined that a particular submarine area beyond the depth of 200 metres 'admits of exploitation'. As was pointed out by Dr. M. W. Mouton in his paper *Recent Developments in the Technology of Exploiting the Mineral Resources of the Continental Shelf*:<sup>3</sup>

'On the one hand, figures given for depths in which exploitation actually takes place are not necessarily an indication of the maximum depth in which it would be possible to build an installation from a purely technical point of view. On the other hand the figures given concerning the depths for which installations have been designed cannot be taken as proof that exploitation at that depth will take place.'

### *The Nature and Extent of the Coastal State's Rights over the Continental Shelf*

The general debate which took place in the Fourth Committee of the 1958 Geneva Conference on the Law of the Sea<sup>4</sup> disclosed that there were, broadly, two different approaches to this question; and that the differences already noted between the terms of the various unilateral instruments by

<sup>1</sup> A/CONF.13/CA/SR19, pp. 2, 3.

<sup>2</sup> A/CONF.13/C4/L29 (Rev. 1.)

<sup>3</sup> A/CONF.13/25, p. 5.

<sup>4</sup> This general debate is recorded in the *Official Records of the United Nations Conference on the Law of the Sea*, volume 6, A/CONF.13/42, pp. 1-31.

means of which rights in the continental shelf had been asserted continued to divide opinion on this matter.

There was, on the one hand, a group of countries, notably Argentina, Mexico, Peru, Chile and Uruguay, who claimed that the coastal State had complete sovereignty over the continental shelf. They justified this contention 'both by reason of the physical nature of the continental shelf and by reason of the nature of rights vested in States'. The submarine areas known as the continental shelf were, they maintained, 'dependent on or an appurtenance of the mainland and their ownership vested in the owner of the mainland. Hence, the coastal State, as the sovereign of the land, also exercised sovereignty over the continental shelf.'<sup>1</sup>

The sea-bed, the delegate of Uruguay maintained, stood in the same relation to the superjacent waters as a country's territory did to the superjacent airspace and if it were accepted that States had complete sovereignty over the sea-bed of the continental shelf, such sovereignty should automatically extend to the superjacent waters.<sup>2</sup> The Mexican delegation put forward a proposal,<sup>3</sup> which 'made the unequivocal claim that the coastal State exercised sovereignty over the seabed and subsoil of the continental shelf and over its natural resources'; this was based on the argument that 'if the continental shelf was indisputably a continuation of the mainland, it should be governed by the same legal régime'.<sup>4</sup> Chile, in supporting the Mexican proposal, 'maintained the position it had taken in 1952 that sovereignty over the continental shelf belonged *ipso jure* to the coastal State' and claimed that it followed from this that the coastal State had the right to exploit 'all the resources of the seabed and subsoil of the continental shelf'.<sup>5</sup>

A large number of other delegations rejected the conception of the coastal State's complete sovereignty over the continental shelf, and regarded its rights as limited to those necessary for the exploration and exploitation of certain natural resources of the continental shelf. In general these delegations accepted the views of the International Law Commission, and attached much importance to maintaining the principle that 'the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the air space above those waters'. Certain delegations found difficulty in accepting the expression 'sovereign rights'. The Italian delegate considered that the implication it carried that sovereignty could be divided into a number of rights was questionable,<sup>6</sup> and other delegates preferred the International Law Commission's previous

<sup>1</sup> A/CONF.13/42, pp. 2-3. The statement quoted was made by the delegate of Argentina in the course of the general debate, but summarizes, in effect, similar statements made by the representatives of the other Latin-American countries referred to above.

<sup>2</sup> A/CONF.13/42, p. 5.

<sup>3</sup> A/CONF.13/C4/L2.

<sup>4</sup> A/CONF.13/42, p. 15.

<sup>5</sup> Ibid., p. 16.

<sup>6</sup> Ibid.

wording 'jurisdiction and control'.<sup>1</sup> Some delegations wished to see the rights of the coastal State limited to the exploration and exploitation of mineral resources only; the majority, however, shared the view of the International Law Commission that the term 'natural resources' should include the products of sedentary fisheries, but should exclude benthonic species. Other delegations wished to see certain kinds of swimming fish included.

It was undoubtedly the question of the legal status of the superjacent water which marked the principal divergence between those delegations who wished to see the principle of complete sovereignty by the coastal State over the continental shelf asserted, and those who wished the coastal States to have only certain rights, falling short of complete sovereignty, over the continental shelf. If it were to be accepted that the coastal State had complete sovereignty over the continental shelf, it would also have to be accepted—as is clear from the statements of those delegations which advocated complete sovereignty—that the coastal State would claim the exclusive right of exploring and exploiting *all* the natural resources of the continental shelf and of reserving to itself, if it so wished, the exclusive right of fishing within the waters lying above the shelf. This would undoubtedly have constituted a far-reaching encroachment on the freedom of the high seas which is only to a very limited extent endangered by the exploration and exploitation of the mineral resources of the shelf and of such living resources as are attached to the bed of the sea.

Battle was, therefore, joined between these two opposing camps. There were other skirmishers on the flanks, notably Federal Germany and Japan who continued, with no support from other delegations, to maintain that under existing international law anyone was free to explore and exploit the subsoil of the high seas, and to propose that rules for the regulation of the exploitation of the resources of the continental shelf should be drawn up by the international community and their application *supervised* by the coastal State.<sup>2</sup>

<sup>1</sup> The United Kingdom Orders in Council made under the Colonial Boundaries Act, 1895, which have already been referred to in this article, were based on this conception of jurisdiction and control. On 17 December 1948 the Secretary of State for Colonial Affairs explained in the House of Commons that the object of the Jamaica (Alteration of Boundaries) Order in Council (S.I. 1948) and of a similar Order made in respect to the Bahamas was 'to extend the jurisdiction of the Governments of those Colonies so as to give them control over the seabed and sub-soil contiguous to their coasts with a view to securing such natural resources as may exist there' (*Hansard*, 5th series, vol. 459, p. 230).

<sup>2</sup> The proposals put forward by Federal Germany are contained in A/CONF.13/CA/L1. As stated in paragraph 2 of this document its underlying thesis was that 'according to the international law in force, the coastal State has no rights over the continental shelf beyond the outer limit of its territorial sea. Accordingly, anyone is free to explore and exploit the subsoil of the sea outside the territorial sea, provided that such activity does not unduly hamper the other activities on the high seas, which under international law are open to all.' In commenting on this proposal Mr. García Amador of Cuba considered it to be 'inconsistent' with the modern political, economic and legal realities which lay at the basis of the International Law Commission's recognition of the coastal State's right to explore and exploit its submarine areas'; A/CONF.13/42, p. 25.



As the final text of Article 3 of the Convention shows, the view of those delegations which followed the International Law Commission in desiring to preserve intact the principle that 'the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas or of the airspace above such waters' prevailed. There was little support for an Argentine proposal<sup>1</sup> to substitute for Article 69 of the International Law Commission's draft a text providing that 'The rights of the coastal State over the continental shelf do not affect the régime of freedom of navigation on the high seas or that of the airspace above the superjacent waters or the epi-continental sea'. This, it will be noted, corresponded very closely with the terms of the Argentine Declaration of 11 November 1946, to which reference has been made earlier in this article. The implications of this Argentine proposal can clearly be seen by examining other amendments proposed in the same document. Argentina proposed that the first paragraph of an article to be substituted for Article 67 should read 'the sovereignty of a State extends over the submarine shelf contiguous to its sea coast to a depth of 200 metres', and also proposed an additional article providing that 'Fishing or the conservation of the living resources of the sea in the waters above the continental shelf shall be governed by any special provisions adopted by the coastal States for the protection of marine species in accordance with quotas and scientific and technical principles'. Taking all these provisions together, it is clear that if they had been adopted they would have resulted in the coastal State having full jurisdiction and control over the continental shelf for all purposes, and particularly over the fisheries in the waters lying above the continental shelf. As other delegations were not slow to point out, lip service was paid in the Argentine proposals to freedom of navigation on the high seas but it was impossible to disguise the complete disregard of another freedom—freedom of fishing.

Those delegations, and they were in the majority, who were not prepared to accept that the coastal State should have complete sovereignty over the continental shelf were, as already indicated, still faced with the problem of deciding the nature of the coastal State's rights over the shelf and the purposes for which those rights should be exercised. The International Law Commission itself had in 1951 referred to the continental shelf as 'subject to the exercise by the coastal State of control and jurisdiction for the purpose of exploring it and exploiting its natural resources', but its eventual conclusion in 1956 appears to have been that the words 'jurisdiction and control' did not make it sufficiently clear that the rights conferred upon the coastal State covered all rights necessary for and connected with the exploration and exploitation of the natural resources of the

<sup>1</sup> A/CONF.13/C4/16.

continental shelf. Moreover, although this is not stated in the commentary, the expression 'jurisdiction and control' presented difficulties of translation, the French word *juridiction* having a more restricted meaning than 'jurisdiction'.

Certain delegations at the Conference expressed uneasiness about the term 'sovereign rights', and the United States delegation proposed the deletion of the word 'sovereign' and the substitution for it of the word 'exclusive'. The purpose of this amendment, as the United States delegate explained in the Fourth Committee,<sup>1</sup> was to avoid any term which might even remotely cast doubt upon the status of the superjacent waters and air space. It appeared to a number of other delegations, however, that the considerations which had led the International Law Commission to use the term 'sovereign rights' were not adequately expressed by the word 'exclusive' which could be interpreted as meaning only that, whatever the nature of the rights over the continental shelf, they belonged to the coastal State alone, a conception to which express recognition is given in paragraph 2 of Article 2 of the Convention. The United States proposal was adopted in the Fourth Committee by a very narrow vote of 21 votes in favour, 20 against and 27 abstentions, and at the Plenary Session of the Conference the United States delegation supported the wording, i.e. 'sovereign rights' used by the International Law Commission.

It must be admitted, however, that the wording finally adopted poses the juridical dilemma of whether it is possible for sovereign rights to exist apart from sovereignty.<sup>2</sup> There are, it is true, many international agreements which provide for some derogation from sovereignty, so that a State will, for certain purposes and by agreement, exercise less than the full sovereign rights it already possesses in respect of a certain matter, but these are, of course, examples of a voluntary limitation of full sovereignty. There are also instances of a State exercising powers of jurisdiction and control in the absence of sovereignty; the concept of the 'contiguous zone', which has been embodied in Article 24 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, itself affords an example of a situation in which a State may have jurisdiction and control, for certain purposes, in an area adjacent to but outside its territory. The fundamental difficulty seems, therefore, to be the conception that a State may have 'sovereign rights' for certain purposes in respect of a certain area, without having sovereignty over that area. The dividing line between the exercise of powers of jurisdiction and control for certain limited purposes, and the exercise of sovereign

<sup>1</sup> A/CONF.13/42. See also Whiteman, 'Conference on the Law of the Sea', *American Journal of International Law*, 52 (1958), p. 629.

<sup>2</sup> The Mexican delegate who, basing himself on the conception of the continental shelf as an 'integral part of the mainland', claimed that the coastal State should have full sovereignty over the shelf, answered this problem by a categoric negative; A/CONF.13/42, pp. 14-15.

rights for the same purposes, is perhaps an extremely fine one; but in the present writer's view, the use of the term 'sovereign rights' has the advantage of carrying the clear implication that rights of property in the natural resources of the continental shelf as defined in the Convention are vested in the coastal State, and that the property in such resources cannot pass to other persons save by way of an express grant.

The International Law Commission did not record whether or not they considered that existing international law provided any examples of an analogous use of the term 'sovereign rights'. Its reasons for adopting in 1956 the term 'sovereign rights' and rejecting the term 'sovereignty' was its desire 'to avoid language lending itself to interpretations alien to . . . the safeguarding of the principle of the full freedom of the superjacent sea and the air space above it. Hence it was unwilling to accept the sovereignty of the coastal state over the seabed and subsoil of the continental shelf.' The Commission's reasons for preferring the expression 'sovereign rights' to 'jurisdiction and control' were to leave no doubt that the rights conferred on the coastal State covered all rights necessary for and connected with the exploration and exploitation of the natural resources of the continental shelf.<sup>1</sup>

On the other hand, had the wording used been 'rights of jurisdiction and control' and not 'sovereign rights' the former expression would not have raised any doubts as to whether the sea-bed and subsoil of the continental shelf can be regarded for any purposes as part of the territory of the coastal State. The intention that it should not be so regarded seems to be clear from the express rejection of the Conference of the term 'sovereignty' and is confirmed by contrasting the first paragraph of Article 2 of the Continental Shelf Convention with Article 2 of the Convention on the Territorial Sea and the Contiguous Zone which expressly provides that 'the sovereignty of a coastal State extends to the airspace over the territorial sea, as well as to its bed and subsoil'. That the point is far from being an academic one can be illustrated by a reference to the municipal law of the United Kingdom. Section 1 (1) of the Petroleum (Production) Act, 1934, for instance, provides that petroleum 'existing in its natural condition in strata in Great Britain' is vested in the Crown and that the Crown shall have the exclusive right of searching and boring for and getting such petroleum. It would seem that if the United Kingdom becomes a party to the Convention on the Continental Shelf, these words should not be construed as applicable to the sea-bed and subsoil of the continental shelf adjacent to but outside the territorial sea of the United Kingdom, and that further legislation to provide for exploitation of petroleum in strata in the continental shelf of the North Sea adjacent to the United Kingdom

<sup>1</sup> A/3159, p. 42.



is likely to be required.<sup>1</sup> It is, of course, true, as Sir Cecil Hurst pointed out in his article entitled 'Whose is the Bed of the Sea?'<sup>2</sup> that in the past the Crown appears to have claimed rights in the sea-bed and subsoil far beyond 3 miles, but there would seem to have been a 'silent abandonment of the more extended claims',<sup>3</sup> except in the case of certain sedentary fisheries, and in later years the Crown ownership of the sea-bed and subsoil does not appear to have been regarded as extending beyond the territorial sea.

The rights which have just been referred to were regarded by Sir Cecil Hurst as resting on the basis of occupation,<sup>4</sup> and as has been indicated earlier in this article, the sea-bed and subsoil lying below the high seas were, generally, regarded in the past as *res nullius* and capable of occupation, and despite the geographical proximity of the submarine areas now known as the 'continental shelf' to the adjacent mainland, those areas were formerly considered as being capable of appropriation by the first occupier. Paragraph 3 of Article 2 of the 1958 Convention on the Continental Shelf expressly provides, however, that 'the rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation'. This provision incorporates in the Convention paragraph 7 of the International Law Commission's commentary on Article 68 of its draft Articles,<sup>5</sup> and was intended, as other paragraphs of the commentary show, to stress that the conception of the continental shelf as *res nullius* and capable of appropriation by the first occupier is one which, whatever recognition it may formerly have gained in international law, must now be regarded as superseded.<sup>6</sup>

### *For what Purposes may the Coastal State Exercise Sovereign Rights over the Continental Shelf?*

#### *(i) Exploration and exploitation of natural resources*

From what has already been said, it is clear that the coastal State does not, under the Convention, possess unlimited sovereign rights over the

<sup>1</sup> The same view is implicit in the Sudan Petroleum Resources Development (Amendment) Act, 1959, Section 2 of which defines 'land' as:

'The territory of the Sudan including land intermittently or permanently submerged beneath inland or territorial waters,

'The continental shelf adjacent to territorial waters.'

<sup>2</sup> *This Year Book*, 4 (1923-4), pp. 34-43.

<sup>3</sup> *Ibid.*, p. 43. Under the Crown Lands Acts, 1829-1936, the Coast Protection Act, 1949, and the Crown Estate Act, the powers of the Crown Estate Commissioners in relation to the sea-bed are restricted to a limit of 3 miles.

<sup>4</sup> Mouton, *op. cit.*, pp. 145-6, criticizes this theory, and considers such rights, at least in respect of sedentary fisheries, to be based on prescription rather than on occupation.

<sup>5</sup> A/3159, p. 42.

<sup>6</sup> This is also stressed by paragraph 2 of Article 2 of the Convention which provides that 'if the coastal State does not explore the continental shelf or exploit its natural resources, no one may undertake these activities, or make a claim to the continental shelf, without the express consent of the coastal State'.

continental shelf. Article 68 of the International Commission's draft articles expressed this limitation in general terms by providing that 'the coastal State exercises over the continental shelf sovereign rights for the purpose of exploring and exploiting its natural resources'. At its Fifth Session, the Commission had decided after long discussion to use the term 'natural resources' in preference to the more limited term 'mineral resources' which had appeared in its earlier drafts. It did so because it had reached the conclusion 'that the products of sedentary fisheries, in particular, to the extent that they were natural resources permanently attached to the bed of the sea should not be left outside the scope of the régime adopted'. At its Eighth Session, the Commission considered the possibility of including the condition of permanent attachment to the sea-bed in the article itself, but decided that the introduction of such a condition or of a wider one, namely, that the marine fauna and flora in question should live in constant physical relationship with the sea-bed and the continental shelf, involved consideration of the scientific aspects of the question by experts.<sup>1</sup>

At the 1958 Geneva Conference, certain delegations, including that of the United Kingdom, contained marine biologists, and the definition of 'natural resources' which now appears in paragraph 4 of Article 2<sup>2</sup> of the Convention was proposed by the delegations of Australia, the United Kingdom, Ceylon, the Federation of Malaya, India and Norway after consideration of the scientific, as well as the juridical, aspects of such a definition.

That it was not an easy definition to arrive at is well illustrated by a preparatory document prepared for the Conference by the Secretariat of the Food and Agricultural Organisation of the United Nations.<sup>3</sup> As was pointed out in this document:

'In only very few species of aquatic organisms is the entire life of each individual spent in close association with the shelf sea-bed and the water lying above it; in most organisms there is a free-swimming phase in the middle or surface waters. However, since in most cases the conditions of life for such a pelagic phase are only to be found in shelf waters, there continues to be for them a necessary and dependent relation between the organism and the shelf even in the free-swimming phase.'

At one end of the scale there are sedentary species which, once the brief larval phase is over, have an absolute physical association with the sea-bed either by fixed attachment, or by lying immobile upon it, or by inability to move except in contact with it. Examples of such species are sponges, corals, pearl oysters and chanks. At the other end of the scale there are demersal species which swim much of the time in close proximity to the sea-bed. Examples of such species are halibut, cod, haddock and hake. In

<sup>1</sup> A/3159, p. 42.

<sup>2</sup> This definition is quoted in full at p. 118, below.

<sup>3</sup> A/CONF.13/13.

between these two extremes there are to be found crustacea which though closely associated with the sea-bed make limited seasonal migrations; examples of such stocks are lobsters, crabs, shrimps and prawns. There were certain delegations at the Conference who would have liked to see all 'bottom fish', i.e. those which are widely migratory but closely related to the sea-bed (e.g. plaice, sole, halibut) included in any definition of the natural resources of the continental shelf.<sup>1</sup> This was certainly not in accordance with the intention of the International Law Commission who, in their commentary on Article 68 of these draft Articles, said: 'It is clearly understood that the rights in question do not cover so-called bottom-fish and other fish which, although living in the sea, occasionally have their habitat at the bottom of the sea or are bred there.'<sup>2</sup>

A moment's reflection should be sufficient to show the juridical difficulty of including these so-called 'bottom-fish' in any definition of natural resources. If they had been so included the coastal State would have had the exclusive rights to exploit these stocks of fish, and thus to reserve to its own nationals the right to fish for these stocks in the waters lying above its continental shelf. It is hardly necessary to emphasize to what a large extent this would have constituted interference with freedom of fishing on the high seas, or its inconsistency with the status as high seas of the waters lying above the continental shelf.

A rather more difficult problem was that of the crustacea, which make only limited seasonal migration from the shelf. To have included them in the definition would, however, again have interfered with freedom of fishing in the superjacent waters, and have been inconsistent with the legal status of those waters.

The definition of natural resources which was finally adopted, and which appears as paragraph 4 of Article 2 of the Convention, is as follows:

'The natural resources referred to in these articles consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say organisms which, at the harvestable stage, either are immobile and under the seabed or are unable to move except in constant physical contact with the sea-bed or the subsoil.'

It will be clear that this definition entirely excludes all swimming fish. It also excludes all swimming crustacea.<sup>3</sup> There is, therefore, now no possibility of any conflict between the specific assertion in Article 3 of the

<sup>1</sup> See, for example, the proposal put forward by the Yugoslav delegation (A/CONF.13/C4/43) under which natural resources would have included 'the so-called bottom-fish and other fish which, although living in the sea occasionally have their habitat at the bottom of the sea or are bred there'.

<sup>2</sup> A/3159, p. 42.

<sup>3</sup> The definition of 'natural resources' as adopted by the Fourth Committee stated this specifically. The words 'but crustacea and swimming species are not included in this definition' were, however, deleted by the Conference in Plenary Session; in view of the express terms of the definition they appeared to be redundant.



Convention that 'the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas' and the rights which the coastal State possessed under the Convention for the purpose of exploiting the natural resources of the continental shelf.

(ii) *Has the coastal State other rights over its continental shelf?*

As has already been seen, the 1958 Conference rejected the conception of the coastal State's complete sovereignty over its continental shelf. Article 2 of the 1958 Convention on the Territorial Sea and Contiguous Zone, it will be noted, affirms the sovereignty of the coastal State over the bed and subsoil of its territorial waters and there is, of course, no room for any doubt that up to the limits of territorial waters the coastal State can make use of the sea-bed and subsoil for whatever purposes it wishes. It is equally clear from the Convention on the Continental Shelf itself that the only rights recognized by that Convention as possessed by the coastal State in relation to its continental shelf are those required for the purposes of exploration and exploitation of the natural resources of the shelf as defined in Article 2 of that Convention. The Convention itself, for example, whilst providing (in Article 5 (2)) that the coastal State 'is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for its exploration and the exploitation of its natural resources', does not provide that similar installations may be constructed by the coastal State on the continental shelf for defence purposes. Equally, however, it does not prohibit the building of such installations by the coastal State.<sup>1</sup> The question of the nature of, or the legal basis for, any other rights which a coastal State may claim to exercise in respect of the Continental Shelf is left untouched by the Convention.

*Delimitation of the Boundary of the Continental Shelf Appurtenant to Opposite or Adjacent States*

Article 6 of the Convention follows closely the text of the International Law Commission's draft (Article 72). It accepts the median line principle (i.e. the principle of equidistance from the nearest points of the base lines from which the breadth of the territorial sea of each State is measured)<sup>2</sup> as that which should govern the delimitation of the boundary 'in the absence of agreement and unless another boundary line is justified

<sup>1</sup> The Bulgarian delegation put forward a proposal which as revised and finally taken over by the Indian delegation read as follows: 'The coastal State shall not use the continental shelf for the purpose of building military bases or installations.' (See A/CONF.13/C4/L41 and A/CONF.13/C4/L41 (Rev. 1).) This proposal was not, however, adopted by the Conference.

<sup>2</sup> The various possible methods of delimiting the boundaries of opposite or adjacent continental shelves were explained to the Fourth Committee of the Conference by Commander Kennedy, a member of the United Kingdom delegation. A summary of his explanation is quoted by Whiteman, *loc. cit.*, p. 651.

by special circumstances', but provides that the boundary shall, in the first place, be determined by agreement between the States concerned. The article does not, therefore, seem wholly satisfactory. In theory, opposite or adjacent States could agree on any boundary they wished, without regard to the median line or any other principle.<sup>1</sup> In practice, this seems unlikely to happen. As in the Treaty of 6 February 1942 between Venezuela and the United Kingdom relating to the submarine areas of the Gulf of Paria, it is likely that the median line will be taken as the starting-point for any negotiations about the boundary of the continental shelf. There is also some obscurity in Article 6 of the Convention as to what is meant by 'special circumstances'. One clear example of 'special circumstances' is, however, the presence of islands. Where the continental shelf underlies an area of shallow sea, such as the Persian Gulf, which has many islands and is surrounded by the coasts of opposite or adjacent States, the drawing of the boundary on the strict principle of the median line could, it is clear, result in many curious and inequitable deflections of the median line. There may, for instance, be a very small island which lies approximately in the middle of the shallow sea; or there may be islands which are so close to the mainland as to be justifiably considered part of the mainland for the purposes of working out the boundary of the continental shelf. Again there may be islands which although near the coast of State A are under the sovereignty of State B.<sup>2</sup> All these circumstances not only show the difficulty of a uniform application of the median line principle, but also explain why the 1958 Geneva Conference found itself unable (as did the International Law Commission in its draft Articles) to include in the Convention any specific provisions about the effect of the presence of islands on the delimitation of the boundaries of the continental shelf.<sup>3</sup>

### *Installations*

Article 5 of the Convention provides that subject to other provisions of that Article, the coastal State is entitled to construct and maintain or operate on the continental shelf installations and other devices necessary for the exploration and the exploitation of its natural resources. It would

<sup>1</sup> The Truman Proclamation states that 'The boundary [of the continental shelf] shall be determined by the United States and the State concerned in accordance with equitable principles'. Similar statements are to be found in the Proclamations issued by the Rulers of the British Protected States in the Persian Gulf (see, for instance, the 'Bahrain' Proclamation of 5 June 1949) and in the Royal Proclamation of the Kingdom of Saudi Arabia made on 5 June 1949.

<sup>2</sup> In his article 'Delimitation of Seaward Areas under National Jurisdiction', *American Journal of International Law*, 45 (1951), pp. 240-66) Whitemore Boggs examines these problems, and suggests methods for their solution.

<sup>3</sup> An Iranian proposal (A/CONF.13/C4/L60) reading as follows: 'Where an island or islands exist in a region which constitutes a continuous continental shelf, the boundary shall be the median line and shall be measured from the low-water mark along the coasts of the States concerned' did not appear to resolve the difficulty, and was rejected by the Fourth Committee.

add considerably to the length of the present article to give any detailed information about such installations and devices; but the various types are admirably described in two papers prepared by Dr. Mouton which form part of the preliminary documentation of the Conference.<sup>1</sup> The Fourth Committee of the Conference discussed, at length, certain problems of a technical nature connected with these installations, but there was no dissension from the principle already asserted by the International Law Commission that 'such installations and devices, though under the jurisdiction of the coastal State do not possess the status of islands'. It was therefore generally accepted that 'such installations have no territorial sea of their own, and that their presence does not affect the delimitation of the territorial sea of the coastal State'. These principles are now written into the Convention as paragraph 4 of Article 5. Their insertion appears to be particularly important in view of the possibility of considerable development in the construction of artificial islands from which such drilling can be carried out.<sup>2</sup> The specific provisions referred to above will also avoid, in relation to installations on the continental shelf, the uncertainty which, in relation to the status of lighthouses and their entitlement to a belt of territorial sea, has so often engaged the attention of writers on international law.<sup>3</sup>

The necessity for reconciling exploration and exploitation of the continental shelf by the coastal State with freedom of navigation and fishing and the conservation of the living resources of the sea is, as explained earlier in this article, one that has arisen mainly because the exploitation of the mineral resources of the continental shelf is now increasingly carried out by means of devices operating in or on the sea-bed. It is for this reason that Article 5 of the Convention not only states in general terms that 'The exploration of the continental shelf and the exploitation of natural resources must not result in any unjustifiable interference with navigation, fishing or the conservation of the living resources of the sea, nor result in any interference with fundamental oceanographic or other research carried out with the intention of open publication', but also has other more specific provisions to this end. There is, for instance, provision for the establishment of safety zones which may 'extend to a distance of 500 metres around the installations and other devices'. Neither the installations nor the safety zones around them may be established where interference may be caused to the use of recognized sea-lanes essential to international navigation. Due notice must be given of the construction of

<sup>1</sup> A/CONF.13/25; A/CONF.13/26.

<sup>2</sup> Artificial 'islands' have for some time past been constructed for the purposes of drilling. An example is the 'rock fill island' which can be found, for example, in the Persian Gulf: it is a platform constructed of lumps of coral from which drilling is carried out.

<sup>3</sup> The problems relating to artificial islands in general are examined by Johnson in the *International Law Quarterly*, 4 (1951), pp. 203-15.



installations, and permanent means for giving warning of their presence must be maintained. Disused or abandoned installations must be entirely removed.

In the opinion of certain delegations, still more detailed provisions relating to installations would have been desirable. The attention of the Fourth Committee was, for example, drawn to the possibility of clusters of installations<sup>1</sup> which might constitute a very substantial impediment to freedom of navigation, but no specific provisions relating to this potential danger were adopted by the Conference.

### *Tunnelling from Terra Firma*

Article 7 of the Convention makes it quite clear that nothing in the Convention prejudices the right of a State to explore and exploit the natural resources of submarine areas by tunnels driven from *terra firma*. Such exploration and exploitation is outside the scope of the Convention and in so far as it requires international regulation it is, therefore, still governed by customary international law.<sup>2</sup> The reason for this is that already referred to above: namely, that the purpose of the Convention is to regulate the right of exploitation of the natural resources of the continental shelf so as to minimize interference with the freedom of the high seas, including the laying of submarine cables, navigation, fishing and the conservation of the living resources of the sea, and that exploitation of the subsoil of the high seas by means of tunnels, cuttings or wells dug from *terra firma* does not result in any such interference.<sup>3</sup> Furthermore, the criterion of the depth of the superjacent waters is quite irrelevant to such tunnelling; when there is a reference to depth in the context of tunnelling, it is to the depth of the layers in which minerals are found under the surface of the earth.

### *Conclusion*

That the 1958 Geneva Convention on the Continental Shelf is not without certain deficiencies has already been indicated in this article. There would seem, however, to be no doubt that it has made a substantial contribution to the progressive development of international law.<sup>4</sup> It

<sup>1</sup> The problems created by clusters of installations are examined by Dr. Mouton in the Preparatory Document No. 21 (A/CONF.13/26, p. 7).

<sup>2</sup> The Convention on the Continental Shelf has, of course, no bearing on the possible construction of a Channel Tunnel between England and France. Whether the subsoil could be effectively occupied by these two countries for that purpose, and what rights would be derived from such occupation are outside the scope of this study of the Continental Shelf Convention.

<sup>3</sup> See Mouton, *Recent Developments in the Technology of Exploiting the Mineral Resources of the Continental Shelf*, A/CONF.13/25, pp. 7-8.

<sup>4</sup> There was a wide measure of agreement during the general debate in the Fourth Committee of the 1958 Conference with the view expressed by the French delegate that 'the articles on the continental shelf drafted by the International Law Commission did not constitute positive

embodies legal rules which remove, to a very considerable extent, the uncertainties which arose out of the unilateral actions taken by a number of States in respect of the continental shelves adjacent to their territories in the years following the Second World War. The possibility of further uncertainties being created by reservations to the Convention was considered by the 1958 Conference, which finally adopted a provision which excludes reservations to Articles 1 to 3 inclusive of the Convention. These are the articles which define the continental shelf, provide for the nature and extent of the coastal State's rights in respect of the shelf, and, most important of all, safeguard the existing status as high seas of the waters lying above the shelf, and of the air-space above those waters.

It is, indeed, Article 3 of the Convention which lies at its centre, and to which the other provisions of the Convention are, in a sense, subordinate. It is the importance of maintaining the principle affirmed in Article 3 which has determined the nature and extent of the rights of the coastal State as set out in the Convention. That in the absence of any Convention on the Continental Shelf coastal States would have continued to assert rights over the continental shelf for the purposes of exploring and exploiting its natural resources is beyond any doubt. That the Convention recognizes their right to do so in so far as the natural resources defined in the Convention are concerned, but at the same time preserves and reaffirms the legal status as high seas of the waters lying above the shelf, may be ranked as no inconsiderable achievement. That it has been possible to reach agreement on legal rules governing the continental shelf which are in step with the considerable technical advances in exploitation of the shelf, and with the needs of the international community, may give encouragement to those who believe that the law of the sea is capable of fruitful and progressive development, and to those who wish to reach agreement upon two major issues—the breadth of the territorial sea and fishery limits—which were left unresolved at the conclusion of the 1958 Conference.

international law, but related to a new legal institution submitted to the Conference for incorporation in positive law'; A/CONF.13/42, p. 1.

# NON LIQUET AND THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY<sup>1</sup>

By PROFESSOR JULIUS STONE

## I. GENERAL NATURE OF THE *NON LIQUET* PROBLEM

THE re-exploration of fundamental questions concerning the legal order is important, not merely for its own sake, but in fairness to the succession of generations through whom knowledge and understanding must be transmitted. Recent contributions to the problem of *non liquet* are essentially of this nature. One of the latest of these not only restates the case for regarding the rule prohibiting the declaration of a *non liquet* as 'a fully established principle both of jurisprudence and arbitral and judicial practice', but also opens new facets of particular importance in the present dynamic stage of international relations. For even though to some minds the *non liquet* issue may seem so minute that even its very existence is controverted, it may be that this minuteness indicates not triviality, but rather that we are here approaching the fundamental structure of the law. Even so, if the metaphor be not extravagant, general scientific concern with sub-atomic particles has accompanied the deeper penetrations of modern physics into the nature of matter. Even if we have been satisfied in the past to assume that international courts have the duty never to refuse to give a decision 'on the ground that the law is non-existent, controversial, or uncertain, or lacking in clarity',<sup>2</sup> the traumatic impact on the law of the changefulness of the age may require us to re-examine the assumptions and the instruments of thought to which we have become accustomed in approaching international legal problems.

The *non liquet* problem is sometimes placed under a widely extended notion of non-justiciability. From the present standpoint it should certainly be examined apart. For while both problems bear closely upon the supposed insusceptibility of certain international disputes to settlement by law—to 'the rule of law' in a broad sense—they do so from different positions. Non-justiciability in the more precise sense is concerned with the overriding assertion of certain State interests even when they may be *contra* or at least *extra legem*. *Non liquet* comes into argument rather when applicable rules of appropriate content and precision are simply not available for adjusting the particular clash of interests.

<sup>1</sup> © Professor J. Stone, 1960.

<sup>2</sup> Both the above quotations are from Lauterpacht, 'Some Observations on the Prohibition of *Non Liquet* and the Completeness of the Legal Order', in *Symbolae Verzijl* (1958), p. 196, at pp. 198, 199. For the present writer's earlier treatment see p. 125, n. 2. For a suggested classification of such deficiencies see below, section VI.





The *non liquet* question, in the present view, inevitably draws one into controversies concerning the source of validity of international law, and the authority of international tribunals, and especially the International Court of Justice, to develop, adapt and create rules of law of new content.<sup>1</sup> Highly speculative questions of legal theory, as well as very technical legal questions, have become entangled in it. In the present writer's earlier treatment he gave reasons for believing that the issue cannot be conclusively resolved by technical legal arguments.<sup>2</sup> It was there submitted that the mere absence of cases in which courts have declared a *non liquet* cannot ground any safe conclusion that such a declaration is as a matter of law *forbidden*. It was also questioned whether (at least on the dominant positivist view) it was logically consistent to say, on the one hand, that the validity of rules of international law and the jurisdiction of international courts both depend upon State consent, and, on the other, that the possibility of a court requiring the parties' consent before applying rules of law newly created by a court to their disputes must on 'self-evident principle' be excluded.<sup>3</sup>

The opinion was there also added that we cannot reduce the problem to a technicality by regarding it, as the International Law Commission's Draft on Arbitral Procedure later<sup>4</sup> tended to do, as a mere matter of procedure. Judge Lauterpacht has pointed out that the Commission's inclusion of a draft article forbidding the declaration of a *non liquet* reflected, not a doubt as to this rule, but the view that 'a self-evident principle which is valid without saying so gains in effectiveness by being formally incorporated as part of codified law'.<sup>5</sup> Yet even granted that this is a correct interpretation of the view of the Commission members, it in no way disposes of the question already raised whether the principle *is* thus self-evident. Moreover, for related reasons, the present writer expressed the view that the *non liquet* problem can probably be fully posed for clear determination only in a legal order in which compulsory jurisdiction over future disputes is fairly

<sup>1</sup> Siorat, *Le Problème des lacunes en droit international* (1959) (here cited as 'Siorat'), is therefore profoundly right in openly treating the problem of *non liquet* as but a part of a study of judicial competence and methods for the creation and development of international law. (See esp. pp. 273-463.) Despite some dissents on M. Siorat's particular conclusions, therefore, the present writer thinks that this work may earn a place, if not a stature, in the *doctrine* of the international judicial process, reminiscent of that of François Gény's *Méthode d'interprétation* (1899), and *Science et technique* . . . (1913-24, 4 vols.), in that of the municipal judicial process.

It is, however, regrettable that on the precise issues with which the present article is concerned, M. Siorat has not apparently taken into account either Sir Hersch Lauterpacht's important study in *Symbolae Verzijl* (1958), nor the present writer's *Legal Controls of International Conflict* (1954). And see below, section VI.

<sup>2</sup> Stone, *Legal Controls of International Conflict* (1954), 153-64, esp. pp. 161-4.

<sup>3</sup> But see Lauterpacht's interpretation, *op. cit.*, p. 196, of the view of the members of the International Law Commission, and below, p. 128.

<sup>4</sup> i.e. after the manuscript of the above volume went to press.

<sup>5</sup> *Op. cit.*, p. 196. He makes a similar point as to Judgment No. 11 (August 12, 1953) of the International Labour Organisation Administrative Tribunal in the *Desranges* case, 35 I.L.O., *Bulletin Officiel*, No. 7, p. 212.

generally accepted. For obviously in merely *ad hoc* submissions the disputants will normally have explored the legal rules available for application to the case, before deciding to submit. And most other cases before the International Court have arisen from the terms of treaties, where submission to the Court's interpretation may be argued to imply a consent that the Court find some meaning of the terms in any event.<sup>1</sup>

In his comprehensive reassertion of the supposed rule prohibiting the declaration of a *non liquet*, Sir Hersch Lauterpacht is concerned (as the above quotations indicate) to base himself 'on practically universal arbitral and judicial practice', that is, on 'positive' international law. It was, he urges, a customary rule of international law based on firmly established uniform practice even before the adoption of Article 38 of the Statute of the Court. The reference to 'the general principles of law recognised by civilised nations' in Article 38 (1) (c) incorporated into international law 'the principle of the completeness of the legal order' as one of these 'general principles'. The learned writer seeks therefore to concentrate scholarly attention on the supposed technical legal foundation of the supposed rule against *non liquet*, within the existing positive legal order of international law. The interest which is attached to this important reformulation is heightened by the appearance in 1959 of a substantial monograph by Lucien Siorat on *Le Problème des lacunes en droit international*, which purports to reach on the basis of practice conclusions strikingly contradicting in some respects those of Sir Hersch Lauterpacht.

One of the present writer's main points has been precisely that this is not a question which can in strictness be decided in such terms, and that finally the main positions in this debate rest on meta-legal premises. Sir Hersch believes, however, that he has sufficiently based the rule excluding *non liquet* on 'positive' international law to render irrelevant the question how far the supporters of this rule have in the past argued from 'meta-legal or other inarticulate major premisses', concerning, for example, the nature and functions of international law, or of law generally, or concerning the judicial function.<sup>2</sup> Though he reasserts in his latest contribution the prin-

<sup>1</sup> An argument not of course necessarily valid. See, for example, to the contrary, Judge Max Huber, dissenting in the *Upper Silesia (Minority Schools)* case, *P.C.I.J.*, Series A, No. 15, pp. 54-55. And see below, at pp. 141 et seq.

<sup>2</sup> Among recent writers Siorat, *op. cit.*, above, p. 125, n. 1, has provided an interesting instance of a theory purporting explicitly to reject any *a priori* or meta-legal base and to proceed only on empirical and positivist study of practice. The interest is twofold. First, despite this explicit rejection, an important part of his arguments still rests on a distinction which he draws between the *réglementation* of the international legal order, namely, 'l'ensemble des règles coutumières et conventionnelles existant à un moment donné'; and, on the other hand, 'le droit' of this order (see, for example, pp. 26, 157, 246): 'Mais il faut bien voir à quoi est imputable cette défaillance de l'ordre juridique: ce n'est pas au droit international, mais aux règles de droit international.' Nor is this contrast wholly attributable to the fact, accepted also by the present writer, that any legal order embraces not merely propositions of law but also the traditional techniques and ideals through which these precepts and principles are applied to particular problems. For, while



ciple of the necessary completeness of any legal system, he believes that he has demonstrated this as a 'positive principle' concluding the present issue.<sup>1</sup>

Another main point of the present writer's analysis has been that, whatever might be the correct answer on the technical legal level, the main importance of the *non liquet* debate concerned the law-creative as distinct from the merely law-applying competence of international courts. In particular, it concerns the question, What is a wise disposition of this competence in the existing conditions of the world? It is the present view that the fact that such a competence is generally conceded to municipal courts cannot conclude the matter on the *international* level. For the municipal judicial authority derives from, and its work is generally subject to correction by, an appropriate legislature capable of making law without the consent of the subjects. There is no international legislature capable, independently of the consent of the States concerned, either of conferring law-creative authority upon courts, of correcting the pronouncements of the courts as to the applicable law, or of itself making a legislative adjustment of the rights and duties of States generally. The nearest that is reached municipally to the international law position is the power of courts to strike down executive or legislative action as unconstitutional, when the constitution-amending process makes it difficult to correct judicial errors. And it is well to remember that for this situation the American doctrine of judicial review of legislation is not the universal solution of all States. This point also Sir Hersch has sought to meet in his recent paper, by acknowledging that there may be a power and even a duty of international courts, after deciding cases (including those involving the *non liquet* issue), to declare that the rule of law which they have applied is for some reason unsuitable and ought to be the subject of 'a voluntary modification of the binding decision'.

On both these heads, that of the supposed 'positive' legal basis of the supposed rule excluding *non liquet*, and that of the wisdom and expediency of such a rule for the quasi-legislative adjustment of the legal rights and duties of States, Sir Hersch's important positions merit most careful study.

acknowledging that *la réglementation* of this order provides no rules for the judge as to the declaration of *non liquet* (see pp. 194, 198), M. Siorat feels able to draw such rules from 'la fonction propre du juge', and from 'les limites d'une compétence judiciaire par nature', under 'le droit international'. (And see p. 241, where the implication seems to be that the judgment in the *Haya de la Torre* case is an illustration of these 'natural' limits, on which see below, p. 142, n. 3. Second, in so far as he thus depends for his basic categorization of cases (see below, section VI) on an analysis *par nature*, his theory gives the appearance of an unusual instance of a 'natural law' approach which leads to the conclusion that in at least one category of 'silence' of the law, that of 'insuffisance sociale', the tribunal is not only permitted to declare a *non liquet* but is obliged to do so. On the tenability of the categorization see below, pp. 144-5, n. 4.

<sup>1</sup> Of course, even if we assume the *necessary* completeness of a *legal order* the question always still remains whether a particular order at its actual stage of development is a *legal order* in that full sense.

II. POSITIVE LEGAL BASIS OF THE EXCLUSION OF *NON LIQUET*

Judge Lauterpacht is at pains, from the start, to distinguish the problem of jurisdiction of international courts, where the requirement of State consent is undeniable, from the problem of the applicable law, as to which his position in the *non liquet* controversy could negate any requirement of State consent. Formulating this negatively, Sir Hersch observes that 'the prohibition of *non liquet* does not mean that a court must not decline to give a decision on any ground. It only means that a court, otherwise endowed with jurisdiction, must not refuse to give a decision on the ground that the law is non-existent or controversial, or uncertain and lacking in clarity'. It is only when the refusal to give a decision, after the court has assumed jurisdiction, is based on the absence or insufficiency of the applicable substantive law that the question of a *non liquet* may properly arise.<sup>1</sup>

'The prohibition of *non liquet*', Sir Hersch contends, 'constitutes one of the most undisputably established rules of positive international law as evidenced by an uninterrupted continuity of international arbitral and judicial practice.'<sup>2</sup> He is careful to say that while this makes 'the rejection of *non liquet* appear as self-evident', it is not really so, since 'the development may well have gone the other way'.<sup>3</sup> While, on the one hand, Sir Hersch seems thus to renounce any claim to self-evidence of the rule of rejection, he still seems concerned to show that this rule can also be deduced from the nature of the legal order.<sup>4</sup> He continues to link the problem with the principle of the completeness of legal orders, saying that the prohibition of *non liquet* under international law is the corollary of the completeness of the international legal order,<sup>5</sup> and that 'the principle affirming the completeness of the legal order . . . is the positive formulation of the prohibition of *non liquet*'.<sup>6</sup> How far the assertion of this relation may be said to be based on positive practice, how far it must be regarded as based on meta-legal assumptions concerning the international legal order and legal orders generally, is obviously of some concern to the learned writer.

The principle of completeness means, from this angle, that 'in regard to contentious proceedings, a legal tribunal is—and must always be—in the position to determine whether a claim is justified in law and whether judgment must therefore be given for the plaintiff or the defendant'.<sup>7</sup> In his

<sup>1</sup> Op. cit., p. 199.

<sup>2</sup> p. 200.

<sup>3</sup> p. 206. The present writer would add that the course of practice relied upon may be interpreted as rather less in its import than the above words suggest. Siorat thinks it has 'gone the other way' in material respects. See below, section VI. The differences between these interpretations of the course of the practice is crucial to the *non liquet* issue, and will be examined below, sections V and VI.

<sup>4</sup> On p. 208 he still refers to this related 'completeness' principle as 'a fundamental jurisprudential principle'.

<sup>5</sup> p. 221.

<sup>6</sup> p. 199.

<sup>7</sup> With respect to advisory proceedings, Sir Hersch seems to acknowledge the difficulties,

opinion, Article 38 (1) (c) of the Statute of the Court 'elevated "the general principles of law recognised by civilised States" to the authority of one of the principal and formal sources of international law'.<sup>1</sup> Furthermore, 'in so much as the principle of the completeness of the legal order is in itself a general principle of law, it became on that account part of the law henceforth to be applied by the Court'.<sup>2</sup> This general principle, he thinks, 'has asserted itself through judicial and arbitral effort more active and more fertile than reliance upon the principle that, in the absence of a restraining rule of law, recourse must be had to the maxim that what is not expressly prohibited is permitted'.<sup>3</sup> The latter maxim or principle, Sir Hersch asserts, is 'of controversial doctrinal value and of limited practical utility'.<sup>4</sup> In this, and in doubt whether this supposed maxim is of legal, logical or ontological force, the present writer has already joined Sir Hersch.

Judge Lauterpacht, then, seems not to consider this principle of the prohibition of *non liquet* as an *a priori* axiom of law;<sup>5</sup> and he appears, therefore, to set himself apart from such views as those of Kelsen, Radbruch, Cossio and Garcia Maynez. He believes rather that this principle, and the related principle of completeness, are customary rules of international law;<sup>6</sup> and he seeks to prove the correctness of his belief by showing that international tribunals faced with the possibility of declaring a *non liquet* have always refrained from doing so.<sup>7</sup> While he admits that there might be some exceptions, he thinks these are negligible.<sup>8</sup> The paucity of cases in which a declaration of *non liquet* was sought by a party or clearly

admitting that in such proceedings 'the problems assume a different complexion'. But he does not think that this need be further discussed, save by suggesting that 'the prohibition of *non liquet* applies there to the full extent in the sense that, as a rule, every question forming the subject-matter of the request for an opinion may be couched in the form of a claim, for instance, in proceedings for a declaratory judgment' (p. 199, n. 2). This, with respect, scarcely answers the main point. By its own terms ('as a rule') some cases will not be explained by it. It is also not easy to see why proceedings for a declaratory judgment *must* take an adversary form, as distinct, for example, from a joint request in the nature of *finium regundorum*. And finally, even if such a claim can be couched in adversary form, we often cannot be sure, until the claim is actually instituted, who is the Applicant (or Claimant). Yet the results of the adversary principle depend on who is the Claimant.

Despite the learned writer's view, therefore, there is certainly some need for some further 'discussion' of advisory opinions.

<sup>1</sup> p. 205.

<sup>2</sup> Ibid.

<sup>3</sup> pp. 207 et seq.

<sup>4</sup> p. 208.

<sup>5</sup> So cf. Siorat, pp. 292 et seq. M. Siorat explicitly rejects the possibility of any *a priori* demonstration of any rules either requiring, forbidding or permitting a *non liquet*. He rejects with particular emphasis the residual negative principle that everything that is not prohibited is permitted (see pp. 199 et seq., 292). Cf. the similar view of Professor Couzinet in the Preface, at p. 11. Though M. Siorat does not refer to Sir Hersch's 1958 views, he purports to follow a similar method in demonstrating what is the rule as to declaration of *non liquet*, namely, an empirical method of inquiry into the decisions of international tribunals. As will be noted below, his similar method, applied to similar data, yields results contradictory in important respects to Sir Hersch's (see below, section VI).

As to the concealed extra-positivist reference in M. Siorat's use of the notion of 'compétence judiciaire par nature', see above, pp. 126-7, n. 2.

<sup>6</sup> Lauterpacht, op. cit., p. 196.

<sup>7</sup> pp. 201-4.

<sup>8</sup> p. 199.



made by a court is common ground in this controversy. What is not common, and what the article under discussion has scarcely advanced, is the question, What binding rule for future decision can be drawn from this course of practice? The multiplication of precedents which is urged as implying the exclusion of *non liquet* may perhaps conclude the question whether in appropriate circumstances the court is *legally obliged* to declare a *non liquet*; though even here reasons have been given for doubting whether 'undisputably' the precedents carry us even so far. But however this last question be, it must be observed even at this point that the precedents certainly cannot *conclude* the question whether the court is at liberty (or has a discretion) *either* to declare a *non liquet* or to proceed to decision.<sup>1</sup>

Although Judge Lauterpacht regards the international legal order as 'complete', he nevertheless recognizes the problems of 'absence of law' in relation to it<sup>2</sup> and of gaps or *lacunae* in it,<sup>3</sup> arising from the absence of that degree of agreement of States to a rule which is 'a hallmark of a rule of positive international law'. Indeed, he thinks these phenomena are 'a typical occurrence' of international law. Such gaps are, in his view, not gaps in the international legal order, but only in 'the applicable substantive law'.<sup>4</sup> *Lacunae* may also be spoken of, rather improperly, he thinks, 'in the political and moral sense', that is where such rules as are agreed are morally questionable, politically reprehensible or obsolete, or otherwise inadequate for the situation to be regulated.<sup>5</sup> The fact that international tribunals have not shown a disposition to act upon the view that there is in such cases a gap calling for a pronouncement of a *non liquet*, indicates for Sir Hersch how firmly established must be the principles of completeness of the legal system and the prohibition of *non liquet*.

### III. RELATION OF THE *NON LIQUET* PROBLEM TO THE JUSTICE OR ADEQUACY OF JUDICIALLY APPLIED RULES

Sir Hersch's view of the role which an international judge must attribute to considerations of justice or adequacy of the rules in deciding what rule to apply in a given case has, at first sight, great attractiveness. In the first place, he says, 'the question whether the existing law is satisfactory from the point of view of taking into account political and economic interests in accordance with justice and reason has nothing to do with its completeness. When it is said that the law is complete, the intention is not to assert that the law is excellent and above criticism.'<sup>6</sup> What the principle of the completeness of the law means is only that 'once the parties have agreed to

<sup>1</sup> These criticisms are mentioned here for perspective; they will be more fully developed later (see below, pp. 139-40). <sup>2</sup> p. 199. <sup>3</sup> p. 204. <sup>4</sup> p. 199.

<sup>5</sup> See pp. 198, 202, 204. And cf. below, section VI.

<sup>6</sup> p. 200.

entrust a tribunal with jurisdiction, they cannot avoid their obligation by contending that the dispute is not a legal dispute in the sense that there are no legal rules by reference to which it can be solved, and that the tribunal cannot decline to give a decision on the ground of the absence of an applicable rule of law'.<sup>1</sup>

The learned writer believes that the judicial duty thus to apply the law in its postulated completeness, even when not 'in accordance with justice and reason', may require courts to arrive at decisions which are ethically, politically or socially unsatisfactory.<sup>2</sup> This leads him to a thesis which, as we shall later show, offers hope of a critical break-through of thought in this whole area.<sup>3</sup> It is that after a court has given judgment based on law which it recognizes as unsatisfactory, it is proper and may even be desirable for the court to add, following the operative part of its judgment, a recommendation as to what the law in the given case ought to be (or rather what modification the law ought to receive). 'A decision, final and authoritative, there must be; there must be no *non liquet*. But that does not mean that there is a sacrosanctity about it which precludes, in proper cases, an expression of opinion on the desirability of a voluntary modification of the binding decision.'<sup>4</sup>

These propositions assume that in so far as the legal system is complete, the content of the rule of law applicable to the particular case can be ascertained by the court without judicial inquiries into its ethical, political or social satisfactoriness. For in so far as such inquiries are involved in giving content to the rule, especially in a *non liquet* situation, it can scarcely mean very much to say that the question whether the existing law is satisfactory 'has nothing to do with its completeness'. In so far as the court must exercise a creative choice in giving content to the rule postulated by the principle of completeness, the court's view of the satisfactoriness of the alternative possibilities must clearly have a great deal to do with it. We are here brought back to the point that the *non liquet* question raises basic issues not only of judicial competence but also of law-creative (or, in a broad sense, legislative) competence in the international community.<sup>5</sup>

#### IV. COMPLETENESS OF THE LEGAL SYSTEM GENERALLY AND THE CONTENT OF PARTICULAR RULES OF LAW

Once the problem of *non liquet* is envisaged (as the present writer believes it must be) not as a mere incident of judicial procedure but as a reflection of the undeveloped state of legislative organs in the international legal order, a more balanced view is possible of the postulated completeness of

<sup>1</sup> Ibid.

<sup>2</sup> pp. 121, 198.

<sup>3</sup> See below, p. 153.

<sup>4</sup> p. 220.

<sup>5</sup> Cf. Siorat, cited above, pp. 126-7, n. 2.

the international legal order as an approach to the human situation. For when a Kelsen, or a Lauterpacht, or other less careful expositors than these, offer us this notion as a compulsive one, sometimes as even inherent in any legal order, they appear to be talking about *judicial* competence. And this seems very plausible to us because we are already accustomed to the notion of judicial tribunals making decisions on disputes submitted to them by States. But when the adequacy of the content of existing law for a dispute is brought into focus by the *non liquet* controversy, quite a different aspect emerges. It is then seen that what is being urged by those who accept such programmes goes not merely to law-applying but, even more importantly, to law-creative competence of courts over States. And any thesis concerning the extension of legislative competence drags with it, as a test of its good sense, also the question of executive and enforcement competence.

It drags with it also, of course, the question how much human competence for such heavy tasks is already in sight. On this level the problem is much wider than what is usually discussed under the caption of *non liquet*. The present writer has elsewhere tried to show, for example, that even within the apparently limited area of judicial interpretation of treaties, the traditional legal canons of interpretation cover over the widest indeterminacies, ambiguities and circuities, in the norms of judicial judgment. And where there is indeterminacy, ambiguity and circuitry in the rules applied, there is law-creating power in the court which applies them. It was there suggested, rather tentatively, that we may have to attribute this covertness of creative judicial activities, not to conscious deceptiveness of tribunals, but to the wellnigh intolerable burden which the condition of legislative and executive powers in the international community forces on to judicial shoulders.<sup>1</sup>

It is, indeed, central to the present writer's position that to prohibit *non liquet* entails the imposition upon the court of a duty to develop new rules limited only by the novelty and range of the matters coming before it for decision.<sup>2</sup> It is, we are convinced, not possible to escape the recognition that, in the debated area of decision where *non liquet* is a real issue, the court must either declare a *non liquet* or necessarily engage in the creation of law by a judicial act of choice between more or less equally available legal alternatives. And since Sir Hersch does not explicitly grant this recognition, it is important to inquire whether his analysis is such as to permit him to dispense with such recognition. At first blush the need for this recognition

<sup>1</sup> See Stone, 'Fictional Elements in Treaty Interpretation', *Sydney Law Review*, 1 (1955), p. 344, esp. pp. 359-68.

<sup>2</sup> So Siorat's recent study of the problem (cited above, p. 125, n. 1, esp. at pp. 323-462) provides a noteworthy attempt to examine what François Gény would have called 'la science et technique' of the discharge of the creative judicial duties which arise when, despite *la silence* of the law, the court is nevertheless forbidden to declare a *non liquet*.



seems to be avoided by the learned writer's skilful use of two distinct notions of 'the completeness' of the legal system. And this makes it the more incumbent on the present writer to show, in order that issues can be squarely joined, that this judicial law-creation is entailed even on Sir Hersch's analysis, and whichever of his two versions of 'the completeness' of the international legal system he may adopt, or, indeed, even if he adopts both together.

#### A. *Basis in the fertility of 'Principles'*<sup>1</sup>

In one sense Sir Hersch seems to mean, by the 'completeness' of international law which excludes *non liquet*, the potential elaboration of the existing principles of international law, and of the general principles of law as a part thereof. The notion refers to the fertility of such principles as the source of rules for new situations. This sense itself, in so far as it embraces 'the general principles of law', presents a maze of alternative versions which the present writer has noted and documented elsewhere, and for none of which its protagonists can claim exclusive authority.<sup>2</sup> But even if, for the sake of argument, we were to accept the 'natural law' version most favourable to Judge Lauterpacht's position, namely, that these principles represent a kind of inexhaustible storehouse of potential law, they still would not dispense the judge from making law-creative choices in the *non liquet* area here discussed. And this for the following reasons.

It is, of course, often possible to attach a decision to the content of some principle or other, as flowing from it. But it is a juristic commonplace that the main judicial problem springs from the fact that opposed decisions can usually be attached to different principles; and, indeed, often to the same principle by reason of its ambiguity, circuitry or indeterminacy. Nothing in these competing starting-points themselves can direct the court which of them is the correct one, that is, the correct principle or version of a principle to choose for the instant case. That choice finally is the court's choice, a law-creating choice, however much it be concealed by the form of logical deduction from the principle finally chosen. In so far as it is the court's decision, it is proper to expect the court to bring its full wisdom to bear in making this legal determination, and to hold the court responsible for the justness and wisdom of the content of the resulting legal rule. It may be added that, out of the context of *non liquet*, Sir Hersch seems himself to have asserted, rather dramatically, an indistinguishable position. For he observed, as recently as 1955,<sup>3</sup> that once we leave the general statement of

<sup>1</sup> Cf. Siorat, pp. 323-5, and the penetrating treatment in this context of the principle of *abus de droit*, *ibid.*, pp. 417-37.

<sup>2</sup> Stone, *Legal Controls of International Conflict* (rev. imp., Suppl., 1953-8), pp. 863-5.

<sup>3</sup> 'Codification . . .', *American Journal of International Law*, 49 (1955), pp. 16, 17. Cf. in the present context, almost contemporaneously, his *Development of International Law* . . . (1958), pp. 165-7.

the principles of international law and ask how these principles apply in particular situations, the apparent certainty of international law usually yields to uncertainty. And this seems, with respect, but the present point without the explanation of it.

### B. *Basis in the adversary principle*

The second basis for asserting the completeness of the legal system found in Sir Hersch's latest exposition is the adversary principle of judicial procedure, that unless the court finds that there is a rule of law supporting the Applicant's claim, judgment must be for the Respondent.<sup>1</sup> Some questions as to the adequacy of this basis raised elsewhere<sup>2</sup> need not detain us here, since we are here concerned only to test what nature judicial activity would have even if the adversary principle were an adequate basis. Let us, therefore, here accept the assumption involved that the adversary principle, at any rate, is a binding principle of international law. When the court decides a case of the kind which gives rise to the *non liquet* controversy, by reference to the adversary principle, is it acting in accordance with a directive of international law which can lead it to only one result? Or is it even then deciding which of two or more existing principles shall be its starting-point, or (for this is the same thing) which of two or more competing rules of potential law shall *by the choice of the court* become the actual ('existing') law for the parties?

It is attractive to say that there is no choice available where the adversary principle operates. Either there is a rule of international law justifying the Applicant's claim or there is not. If there is, the law directs judgment for the Applicant; if there is not, it directs judgment for the Respondent. But this clarity immediately vanishes when we ask—*How does the court ascertain whether there is a rule of international law justifying the Applicant's claim?* Clearly this cannot mean that there must always exist before the court's decision a rule covering the precise circumstances of the instant case. Judge Lauterpacht, of all writers, would certainly insist that the court must be free to decide for an Applicant if in its opinion the claim can be justified by a rule which, though never applied before, flows from established principles of international law or from the general principles of law. But if this is so, then the question whether the adversary principle (here assumed to be valid) operates in a particular case to direct the court to reject the

<sup>1</sup> Despite the present belief that the analysis below, pp. 136-7, is correct, it may not yet be accepted or even as yet known to legal advisers and courts. Where, therefore, the actual conduct of States and courts is concerned, we may still have to contemplate the possibility that the erroneous assumptions continue to prevail.

See generally Tammelo, 'The Logical Structure of the Law Field', *Archiv für Rechts- und Sozialphilosophie*, 45 (1958), p. 95, at pp. 97-100; and 'On the Logical Openness of Legal Orders', *American Journal of Comparative Law*, 8 (1959), p. 187, at pp. 191-203.

<sup>2</sup> Stone, *op. cit.*, above, p. 125, n. 2.

Applicant's claim, itself depends on the court's own appreciation of what bearing, if any, the above principles of international law and the general principles of law have on the Applicant's claim.

Yet we have already seen, in connexion with that view of the 'completeness' principle which bases itself on the fertility of 'the principles of law', that this does not mean that the particular principle *directs* the court to the one result reached with the compulsion of a legal command. For other principles may have been available from which a different rule or rules would have sprung, favouring respectively either the Applicant or the Respondent. It is the court which decides which rule is reached. Moreover, where, not infrequently, only one principle is available, it may still not *dictate* the particular rule. If the principle contains (as it too often does) a category of meaningless or multiple or circuitous or indeterminate reference, it may for the facts at hand be potentially productive of more than one rule, of which one might favour the Applicant and another the Respondent State.

Far from it always being the case, therefore, that the adversary rule excludes law-creative activity of the court, the truth is often rather that *the adversary rule only comes into play if the court chooses not to exercise its law-creative function of selecting a principle (or the competing version of a principle) from which to derive a rule for the case*. In these tasks of choice and of selection, it is again proper to expect that the court should bring its full wisdom to bear in order to produce as just, expedient and wise a rule as possible.

### C. *Bases of the completeness principle and the duty of judicial law creation*

Judge Lauterpacht draws back from the Kelsenite view of the completeness of the legal system as based on the operation of the supposed 'residual negative principle', that conduct of a State which is not legally prohibited is legally permitted. He purports, indeed, *not* to rely upon it to demonstrate the completeness of the international legal order. It may be appropriate, however, to draw attention to certain important points affecting the relevance of this basis to the 'completeness' thesis, especially in the context of Judge Lauterpacht's apparent rejection of it accompanied by his reliance on the adversary principle. For the present writer's analysis, now developed also by others,<sup>1</sup> indicates that in any case, and apart from all other difficulties, the operation of the adversary principle alone cannot suffice to exclude the possibility of *non liquet*. For even when in an adversary proceeding the court gives judgment for the Respondent on the ground that no rule of law has been found to support the Applicant's case, this judgment certainly determines that the Applicant does not win, and that the rule on which his

<sup>1</sup> See notably Tammelo, 'On the Logical Openness of Legal Orders', loc. cit., in p. 134, n. 1.



case depends does not exist. But then, a declaration of *non liquet* by the court would also have the same effect.

In order for the judgment on the adversary principle to go beyond a mere declaration of *non liquet* the judgment for the defendant would have to invoke also some other principle. Moreover, this further principle would have to be one which provides, or authorizes the creation by the court of, a substantive rule of law to base the decision which is general enough in its reach to cover all the conceivable cases of silence or obscurity of the existing content of substantive law. The 'residual negative principle', that what is not legally prohibited is legally permitted, would directly provide such a substantive rule in contentious cases. It would effectively (even when not particularly wisely) complete the legal order, since any absence of a legal prohibition would under this principle constitute the presence of a legal permission. The 'no-law's land' of *non liquet* would be occupied by permissive legal rules.<sup>1</sup>

But Sir Hersch rejects this 'residual negative principle' as a basis of his position. And in so far as he does so, his only alternative method of ensuring that the adversary principle shall not yield a mere *non liquet* is to invoke the principle of judicial authority of law-creation.<sup>2</sup> The recognition that the exclusion of *non liquet* implies judicial law-creation is thus again reached by this line of analysis.

In terms of recent work on the modalities of legal behaviour, this result can also be stated as follows. A court's decision for a Respondent in a contentious proceeding on the ground that there is no rule of international law supporting the Applicant's claim (international law being completely silent on the particular matter) does not necessarily imply that the Respondent's behaviour<sup>3</sup> was legally *permitted* by international law. It could equally mean merely that it was legally *neutral* in relation to the law in question. In so far as judgment for the Respondent in such a case does not necessarily imply the application of any rule of substantive law relevant to the particular subject-matter, it can also not serve to provide any rule of law for future cases; any more than could a declaration of *non liquet*. On the other hand, when the 'residual negative principle' is invoked, that principle itself has the effect of rendering the Respondent's behaviour legally permitted, for this principle in so far as it is adopted equivalates legal neutrality to legal permission. So also, once the recourse to the principle of judicial law-

<sup>1</sup> Cf. in some aspects Goldie, 'Legal Pluralism and No-Law Sectors', *Australian Law Journal*, 32 (1958), p. 20.

<sup>2</sup> Cf. Siorat's rejection of the residual negative principle, *op. cit.*, p. 292. For that writer the rejection does not raise comparable difficulties, since he does not argue that there is any *general* rule prohibiting declaration of *non liquet*; and, moreover, he expressly recognizes creative judicial activity as the necessary corollary of such a prohibition.

<sup>3</sup> See, for example, work cited above, p. 134, n. 1.

creation to fill gaps in the law is recognized, it is the judgment itself which has the effect of rendering the Respondent's behaviour legally permitted.

In short, unless one or other of these principles is resorted to, the court's judgment for the Respondent merely on the adversary principle does not really settle the case as a whole, but only a certain phase of it. Thus, the judgment's affirmation of the Respondent's freedom of action does not necessarily negative the Applicant's freedom of contrary action, for only a rule which legally permits conduct (as distinct from *being merely neutral* towards it), logically implies a rule prohibiting an *actus contrarius* thereto. It may, indeed, be no exaggeration to say that the judgment for the Respondent in an international suit, based on the use of the adversary principle to fill a gap in substantive international law (such as Judge Lauterpacht admits can exist), should strictly have only the effect of a *non liquet*, unless supplementary recourse is had either to the 'residual negative principle' or to the principle of judicial law-creation. And in so far as this is so that learned writer would appear to be affirming a result (namely, the completeness of the international legal order) while reluctant to accept either of the grounds without one of which this result cannot be reached (namely, either the residual negative principle or the principle of judicial law-creation). And since Sir Hersch is explicit that his position does not rest on the 'residual negative principle', he would seem to be committed (implicitly at any rate) to admit that a rule prohibiting *non liquet* also demands judicial law-creation.

Protestations will no doubt continue to be made, in the name of one or other of these principles of completeness, that international courts never make but only discover or reveal what was already implicitly a rule of law.<sup>1</sup> This, however, can be no more plausible internationally than it has been municipally since the analyses of Holmes, Cardozo, Gény and others. It is believed, accordingly, that we have here one unquestionable common platform from which to examine the present state of the *non liquet* controversy. This is that both sides must perforce recognize that to exclude the possibility of a *non liquet* is to order the court, whenever the authoritative materials give no single and clear directive, to choose that content for the rule which it must apply which (in the analogous words of the Swiss Civil Code) he would choose if he were the legislator, using of course whatever experience and knowledge are available to that end.

<sup>1</sup> No doubt the fact that choices are thus available does not mean that these are arbitrarily made. And, of course, as in M. Siorat's recent formulation, the judges are to a degree guided and limited by 'la science du droit' and 'la prudence du droit'. Siorat, pp. 323 et seq., esp. pp. 357 et seq., 390 et seq., and 433 et seq. But the very limited precision which M. Siorat's efforts at rigorous examination have succeeded in bringing to these notions leaves the main point in the text unqualified.

V. PROHIBITION OF *NON LIQUET* AS A 'POSITIVE' RULE ARISING  
FROM ARBITRAL AND JUDICIAL PRACTICE

'It is not easy', writes Judge Lauterpacht, 'to conceive of a rule or principle of international law to which the designation "positive" could be applied with greater justification than the prohibition of *non liquet*.'<sup>1</sup> This firm opinion of a usually cautious thinker bases itself, first, on an account of a number of international decisions in which the *non liquet* question appears to have posed itself more or less directly and clearly; and, second, upon a deductive argument taking as its starting-point Article 38 (1) (c) of the Statute of the International Court of Justice. Certain observations must be made in the present section as to the first basis; the second (treaty) basis will call for comment in the succeeding section.

Though the learned author devotes a substantial part of his paper<sup>2</sup> to citing arbitral incidents and holdings, he has (in one sense) not made as much of the course of practice as he might. The present writer pointed out in 1954 that 'in the thousands of cases considered during more than one hundred and fifty years of modern international arbitration a *non liquet* has not been squarely pronounced in a single case'.<sup>3</sup> He added that this was the more striking in view of the 'unquestionable deficiencies of international law, as well as the rapid breakdown of many traditional parts of it under the impact of technological, economic and political change during this period. In these circumstances, it would be a miracle if many cases had not arisen on which no clear rule of positive law was available to the arbitrator.' And the present writer observed upon the fact that 'even disputant States, never backward in challenging awards on all other conceivable grounds, have nevertheless resorted so little' to invocation of *non liquet*.

No particular enumeration of instances can, it is believed, enhance the virtual *unanimity* of practice in shrinking back from the *non liquet* submission and holding which this writer took for granted when he challenged the common assumption that this practice established a rule prohibiting *non liquet*. What is in issue is not the general refrainer, but what that refrainer imports. In particular does it import on the part of State representatives a conviction that the *non liquet* plea is impermissible as distinct from merely inexpedient or unnecessary? And does it import on the part of tribunals as a ground of decision, not merely that they were not bound to declare a *non liquet*, but also that they were *prohibited* from doing so? It has to be admitted, the present writer believes, that both the non-use of the plea by States, and the absence of declarations of *non liquet* by tribunals, can be readily explained on various grounds other than the assumed existence of a general rule of international law forbidding such declara-

<sup>1</sup> p. 206.

<sup>2</sup> pp. 199-206.

<sup>3</sup> Op. cit., pp. 162 et seq.



tions.<sup>1</sup> Among the more important of these grounds is the likelihood that in any projected international order, in which compulsory advance submission to judicial settlement is vastly more extended than it has been in the past, the attitude of States towards judicial development of the content of the law would be very different from their attitude hitherto, when each exercise of the judicial process has rested on a limited and largely *ad hoc* submission by the States concerned.

The cases have now been re-marshalled which support the view that 'the practice of international tribunals has rejected . . . consistently the notion of *non liquet*'.<sup>2</sup> Yet none of them quite sustains the word 'rejected'. (It is common ground that parties have 'seldom if ever' offered this plea.)<sup>3</sup> They seem to sustain only two lesser propositions. One is that there is no rule of international law requiring a tribunal *proprio motu* to declare a *non liquet* by reason of obscurity or absence of the content of law. A second is that a tribunal which does not declare a *non liquet*, in appropriate cases, may proceed to create a rule of law of suitable content for application to the case. *The disputed proposition* is whether there is a rule of law *prohibiting* the declaration of *non liquet*; and on this proposition (as distinct from the first two) the practice cited seems indeterminate.<sup>4</sup> It seems not to follow from the fact that past tribunals have chosen in many cases to devise new rules for the case rather than declare a *non liquet*, that therefore there is a rule prohibiting future tribunals from ever declaring a *non liquet*. The course of declaring a *non liquet* may still be open under a legal system, even though it has as yet not been resorted to.

The distinction may seem a fine one between the question whether in the absence or obscurity of the law the court *is bound* to declare a *non liquet*, and the question whether in such circumstances the court is *permitted* to declare a *non liquet*. Yet the distinction is critical. For obviously even the mere permissibility of a *non liquet* would refute the view that there is a *prohibition* of *non liquet* in international law. And, conversely, the cases cited may merely show that tribunals *have not chosen* to declare a *non liquet*, rather than any view of the tribunals that they *could not* do so. When it is said<sup>5</sup> of the *Eastern Extension* case<sup>6</sup> that neither the tribunal nor the defendant Government suggested that, if there were a gap, a *non liquet* would

<sup>1</sup> Stone, *op. cit.*, above, p. 125, n. 2, at pp. 162 et seq. It should be noted, however, that Sir Hersch regards the above reasoning as a 'distinction without a difference' (*op. cit.*, p. 203). Siorat, who takes the view that the court is *obliged to declare a non liquet* in certain cases, namely, those where the law is 'socially insufficient', explains the paucity of decisions on the ground of 'la volonté des parties d'aboutir' (p. 174). He adds (*ibid.*) that, in many disputes as to territory where the *non liquet* situation is most likely to arise, the parties frequently forestall it by explicitly authorizing the tribunal to act as *amiable compositeur*.

<sup>2</sup> Lauterpacht, *op. cit.*, p. 203.

<sup>4</sup> See below, p. 159 and above, p. 130.

<sup>3</sup> See p. 203.

<sup>5</sup> p. 201.

<sup>6</sup> *Reports of International Arbitral Awards* (1955), p. 112.

have been 'the necessary result', this still leaves open the question whether it would have been a *possible* result. When the arbitrator in the *North Eastern Boundary* case,<sup>1</sup> though finding that the available evidence did not enable him to lay down the boundary 'in accordance with law', nevertheless determined an appropriate boundary and did not pronounce *non liquet*, a similar comment is warranted. This shows merely that the arbitrator is *not bound* to declare a *non liquet*, not that he was *prohibited* by international law from doing so.<sup>2</sup>

Similarly, the good reasons which may be offered why courts should not be *obliged* to declare a *non liquet* in all cases where there is absence or obscurity of the law, may not be decisive as to whether they should be *prohibited* from declaring a *non liquet* in all cases. Yet there is probably rather less reason to suppose that courts will have sufficient tact, foresight and wisdom to make adequate rules for every future problem, however novel, than there is to think they will be sufficiently so endowed to decide when it is within their reach to make an adequate rule for a new problem and when it is not. If the courts can find a better way to handle a case before them than by pronouncing a *non liquet*, they should be free to take it. But if they cannot find a better way, why should they be prohibited from declaring a *non liquet*? To leave open the *possibility* of a *non liquet* is not to suggest that the declaration of a *non liquet* should become a regular, or even frequent, course; it means only that there may be some cases, none the less important because they may be a minority, for which no other wise solution is at present available.

## VI. THE OBLIGATION TO DECLARE A *NON LIQUET* IN CASE OF *INSUFFISANCE SOCIALE* (THEORY OF L. SIORAT)

In what must surely become a leading monograph on the *lacunae* of international law, Lucien Siorat has recently provided a number of valuable reflections on the *non liquet* problem. Claiming, like Sir Hersch Lauterpacht, to proceed on the basis of practice and to reject all *a priori* positions<sup>3</sup> as well as any easy transfer of municipal law analogies to international law, he has advanced suggestions which are as interesting as they are difficult.

M. Siorat interprets the practice in the light of what he conceives to be

<sup>1</sup> See *op. cit.*, p. 202, and discussion there cited.

<sup>2</sup> The point, of course, may take different forms. Thus Sir Hersch regards it as important to conclude (in relation to the *Reservations to the Genocide Convention* and the *Anglo-Norwegian Fisheries* cases (*I.C.J. Reports*, 1950, p. 151, and *ibid.*, 1951, p. 116)) that the court's recognition of the divergence of pertinent State practice 'did not lead it to raise the question of the inability of the court to make a pronouncement on the ground that there was no rule or principle in existence upon which it could act' (*op. cit.*, p. 204). But it is common ground that courts are *permitted* to devise rules to fill gaps in the substantive law. The issue is whether by the prohibition of *non liquet* they are compelled to do this *in every case*, regardless of their own views of the wisdom of this course.

<sup>3</sup> But see above, pp. 126-7.

'la fonction propre du juge' and 'la compétence judiciaire par nature' (p. 241), and it must be obvious that these conceptions themselves cannot be regarded as derived from positive law and practice. Against this background, at any rate, he identifies the general problems of deficiencies in the law, including *les lacunes*, as one of the 'ensemble des difficultés que l'organe judiciaire international peut rencontrer dans l'exercice de ses fonctions'.<sup>1</sup> These 'deficiencies' he sub-classifies, in turn, as (1) *obscurités*, (2) *insuffisances logiques*, (3) *lacunes*, (4) *insuffisances sociales*, (5) *carences de droit*. These categories, the author admits, are not class-concepts of definite outlines, but rather type-concepts; their boundary lines are rather vague and mobile, so that one may merge imperceptibly into another. He nevertheless feels warranted in asserting that each has 'une relative autonomie permettant de la constituer en un type distinct . . .'.<sup>2</sup>

'Obscurity', as the author states it, is where there is an 'obscurité dans la réglementation lorsque, au regard du cas d'espèce, le sens d'un traité ou de la coutume paraît douteux'.<sup>3</sup> 'Logical insufficiency' is where 'le traité ou la coutume n'a qu'un rapport indirect avec le cas d'espèce'.<sup>4</sup> *Lacunae*, or silence in the author's stricter sense, is 'le défaut des traités et de la coutume qui ne prévoient pas la solution d'un cas d'espèce'.<sup>5</sup> It is a gap in the available rules, created or left by mere improvidence. *Insuffisance sociale* is defined by the author as 'lorsque les traités et la coutume ne prévoient pas la solution du cas d'espèce qui peut être obtenu seulement par une amiable composition entre les États parties au différend'. (Yet it is clear from his further discussion that this definition is inadequate even for his own purposes unless it be added that the absence of provision is intentional, or 'willed' (*voulu*), by the parties.<sup>6</sup>) In *carences de droit*, on the other hand, he thinks, 'les règles en vigueur prévoient pour le cas d'espèce une solution qui n'est pas jugée satisfaisante par les États parties au litige'.<sup>7</sup> But here again, if the author's argument is to be understood it has to be added that it is one in which the parties have willed that the tribunal should decide the matter not by reference to the law (which *ex hypothesi* they deem unsatisfactory), but *ex aequo et bono*. Unlike the case of the mere *lacuna* where the gap is *par nature*, the gap, in the case of both the *insuffisance sociale* and the *carence*, is *par détermination des États*. The difference between the two latter is that in the case of the *carence* the law provides an applicable rule, but one which the parties regard as not satisfactory; while in the *insuffisance sociale*, the law provides no rule.<sup>8</sup> A

<sup>1</sup> See pp. 23, 440.

<sup>2</sup> p. 131; and see p. 82. The author also thinks of these categories as standing in a certain quasi-logical relation and order *inter se* above preserved; see, for example, pp. 131 et seq., 157 et seq. This aspect need not be here pursued.

<sup>3</sup> p. 63.

<sup>4</sup> p. 131.

<sup>5</sup> p. 23.

<sup>6</sup> p. 157. Though how and by whom a silence is 'willed' in the case of custom is left even more nuclear than in the case of a treaty.

<sup>7</sup> pp. 86 et seq.

<sup>8</sup> pp. 85 et seq., 186 et seq.



satisfactory solution of the dispute where there is *insuffisance sociale* would need to be *praeter legem*; but in the *carence* it would *ex hypothesi* have to be *contra legem*.

Of the five categories of deficiency in the content of law which he thus distinguishes, the author apparently regards 'obscurity', 'logical insufficiency' and the *carence de droit* as not involving a gap or absence of content of law.<sup>1</sup> The reason, as to the former two, is that the law does provide some rules the exegesis of which in order to cover the case is a proper part of the judicial function; the reason, as to the latter, is that there the States concerned have (as it were) requested the tribunal to replace the unsatisfactory provision. For him, therefore, the problem of *non liquet* is in substance reduced to the two cases of 'social insufficiency', and gap (*lacuna*) in his strict sense.

As to the 'social insufficiency', M. Siorat claims that the court is not only free to declare a *non liquet* but is obliged by the 'procédés ordinaires de jugement'<sup>2</sup> to do so, though it must be admitted that the sparse practice which he offers in support is far from conclusive.<sup>3</sup> As to the gap (*lacuna*) in his strict sense, M. Siorat is as emphatic that the international judge is competent to fill it as he is emphatic that such a judge is incompetent in the case of the *insuffisance sociale* and must there declare a *non liquet*.

This thesis, and its underlying categorization, have a most attractive tidiness. Taken at its face value it stands rather at odds with the considered views of Judge Lauterpacht, and also, though perhaps less seriously, with those of the present writer. M. Siorat is so far from concurring in Sir Hersch's assertion that there is a general rule forbidding the court ever to declare a *non liquet*, that he offers a category of cases in which the court would be obliged so to declare, and in which it would be an unlawful *excès de pouvoir* for the court to render any decision on the merits. To the extent that his thesis denies that any *general* rule prohibiting *non liquet* is clearly established by the course of practice, and purports to do so on the

<sup>1</sup> See, however, above, section IV, as to the difficulty of sustaining this line of separation.

<sup>2</sup> p. 189, and see pp. 186-7, 252.

<sup>3</sup> His main reliance is on the controversial *Haya de la Torre* case, *I.C.J. Reports*, 1951, p. 71. See also Sir H. Lauterpacht, *op. cit.*, above, p. 133, n. 3, at 142-8. In the present view, however, the refusal of the Court there to specify the required method of terminating the asylum pursuant to its earlier judgment of 20 November 1950 in the *Asylum* case, *I.C.J. Reports*, 1950, pp. 77, 395, is more easily explained without reference to the *non liquet* doctrine at all. For in so far as the second judgment was upon a request to interpret the earlier judgment, by indicating whether under it Colombia was obliged to hand over the refugee, it might be argued that the Court did not refuse to decide the precise issue, and that the case is thus not relevant to the *non liquet* problem. Such a possibility (and cf. Sir H. Lauterpacht, *loc. cit.*) makes the case a very weak foundation for M. Siorat's argument from practice.

Conversely he has to criticize a case such as the U.S.-U.K. boundary dispute concerning Nova Scotia (Politis and Lapradelle, *Recueil des arbitrages internationaux* (1924), p. 308, esp. pp. 358-65, 375-6) which in his view involved *insuffisance sociale*, but where the Tribunal did not declare a *non liquet*. See Siorat, pp. 164-7, 210-12, and 186-90.

basis of a careful examination of this practice, it agrees with part of the present writer's position. Yet it is to be added that whatever the value of his arguments from the 'nature' of the judicial function to the obligation to declare a *non liquet*, M. Siorat certainly does not seem to have clearly demonstrated this obligation (as he projected he would) by reference to the practice of international tribunals.

So far as M. Siorat would (*insuffisance sociale* apart) agree with Sir Hersch that it is open to the court to decide any case over which it has jurisdiction regardless of any gap in the applicable content of law as this stood immediately prior to decision, it will already be clear that the present writer concurs with both learned writers. For, as indicated in the preceding section, the final issue to which this present article is directed is not whether the court *can* render a decision to fill a gap, but whether, as Sir Hersch and other authorities have urged, it is legally *obliged* to do so. The issue, in other words, is whether a declaration of *non liquet* is always prohibited, and it has been the present submission that on this exact issue the practice is not decisive.

It is, perhaps, the most serious consequence of M. Siorat's inadvertence to the recent literature<sup>1</sup> that the learned writer has not squarely addressed himself at all to this precise issue, that is, to the difference between saying that the court is *permitted* or able or competent to decide the case, and saying that it is *legally obliged* to do so. Whenever he approaches the point, for instance in relation to the simple *lacuna*, he uses terms of ambiguous import. He says that the court 'can' (*peut*), or has the competence (*la compétence*) to fill such a *lacuna*.<sup>2</sup> This form of words does not strictly exclude the possibility that it is open to the court to decide the case or to declare a *non liquet*.<sup>3</sup> Nor can it be easily assumed that it is M. Siorat's view that whenever an international court *can* decide a case, it *must do so*, for instance because an assumed principle of international law prohibiting a 'denial of justice' imposes on him an obligation to exercise it. And this for three reasons. First, the learned author shows himself very vigilant against automatic and unargued transposition of municipal law concepts to the international field. Second, in relation to *insuffisance sociale*, where M. Siorat insists that the court is prohibited from deciding and is obliged to declare a *non liquet* instead, he is concerned to stress that this is so even though it involves a 'denial of justice'.<sup>4</sup> Clearly he is not using this term as

<sup>1</sup> See above, p. 124, n. 2, p. 126, n. 2.    <sup>2</sup> See, for example, pp. 252, 253-313, esp. 287, 313.

<sup>3</sup> And see p. 199, where the author seems clearly to envisage this possibility. In a very long treatment the only suggestion that the author intends to exclude judicial discretion in this case is one sentence on p. 252, and even there the indication is very oblique and uncertain. On the other hand, when M. Siorat wishes to make clear that the court is under an obligation to take a certain course, e.g. to declare a *non liquet* in cases of social insufficiency, he has no difficulty in expressing this unambiguously, using such words as 'il sera tenu' (pp. 186-7), 'il ne pourra pas statuer' (p. 252), and, of course, the verb 'devoir' *passim*.

<sup>4</sup> See pp. 186-7, 252.

expressing any binding principle of international law. Third, and on principle, such an interpretation would in any case only beg the question whether the court has a mere discretion to decide, or a legal obligation to do so. No practice squarely on the point is offered by M. Siorat any more than by Sir Hersch Lauterpacht. And since the former is so clearly anxious to disclaim any preconceptions as to *non liquet* based on *a priori* principles, it seems best to understand his thesis as not touching the main issue here taken.

On the more general level there is much in M. Siorat's thesis which seems to march at any rate in the general direction which the present writer regards as fruitful. His clear warning that the solutions to the problems of *lacunae* in the international legal order may contrast with, rather than follow, those which are historically usual in municipal legal orders, is entirely salutary.<sup>1</sup> He is concerned to give proper weight, as is the present writer, to the implications for these problems of the voluntary nature of all judicial jurisdiction over States in the international order,<sup>2</sup> and to the relation of the *non liquet* question to that of the competence of the judge not only *quoad* parties and subject-matter, but also *quoad* the law to be applied.<sup>3</sup> Indeed, the bold strokes with which the learned author introduces his two long chapters on 'The Question of *Non Liquet*' are entirely acceptable to this writer as a statement of the present situation.

'Contrairement au droit interne [writes M. Siorat], le droit international ne consacre ni obligation de surseoir à statuer, ni l'interdiction de refuser de statuer, faites au juge dans tous les cas où il se heurte à une déficience quelconque de la réglementation existante; il laisse au juge le soin de décider dans quels cas il doit refuser de statuer parce que, en raison de certaines déficiences de la réglementation, il ne pourrait rendre une sentence sans sortir des limites de sa fonction. . . .'

Such dissents as might here be made from that writer's position turn on the acceptability of some of his more detailed inductions from the course of international decisions, and of some of his more detailed deductions from 'la fonction judiciaire par nature'. And the degree of relevance of these to the main point of the present article does not warrant further extended treatment in this place.<sup>4</sup>

<sup>1</sup> See pp. 194 et seq.

<sup>2</sup> See pp. 236 et seq.

<sup>3</sup> See, for example, p. 252, as regards *insuffisance sociale*.

<sup>4</sup> Three observations may perhaps be briefly made. One concerns the curious consequences, in terms of promoting wise and informed judicial decision, of the author's view that the court can fill a 'silence' in the applicable law inadvertently left by the parties (*lacuna*), but is forbidden to fill a gap deliberately so left (*insuffisance sociale*). In neither case could we be sure that there would be sufficient experience of the subject-matter to guarantee a wise judgment. But it is more likely that the court will have some familiarity with the social, economic or political problems involved in the case of a 'social insufficiency', where the parties have been advertent, than in that of a simple *lacuna* (e.g. as to acquisition of sovereign title to the surface of the moon), where they have been inadvertent. To this extent, M. Siorat's solution, whatever its logical basis, seems to forbid decision in those cases where it is likely to be wiser, or at any rate less unwise.



# VII. PROHIBITION OF *NON LIQUET* AS A 'POSITIVE' RULE BASED UPON ARTICLE 38 (1) (c) OF THE STATUTE

In his recent presentation Sir Hersch gives the 'completeness' principle (with its corollary of the prohibition of *non liquet*) a double source, one in customary international law, the other as being among the 'general principles of law recognised by civilised nations'. On the other hand, he says that the prohibition of *non liquet* is a principle of customary law 'indisputably established' by 'an uninterrupted continuity of international arbitral and judicial practice'.<sup>1</sup> The immediately preceding section of this article has shown, it is believed, that as regards *prohibition* this claim may not be fully sustained by any evidence yet offered. That leaves the learned writer's

Second, Siorat's central distinction between simple *lacunae* (on the one hand) and social insufficiencies (on the other), may in practice not be a meaningful one. M. Siorat conceives of social insufficiencies as intentional silences (*silences intentionnels*, p. 160) or as silences willed by the States (*silences voulus par les États*, p. 190). But in so far as the silence of the law, as supposedly willed by the States in this category of case, is not a mere *ex post facto* rationalization, the will would have to be expressed in a legal norm created by them by which they have removed the particular matter from legal regulation. And in so far as they have made such an expression, and have regulated the matter in the sense that they have decided that the law shall not be applied to the matter in question, that the law is to be regarded as silent concerning it, then the particular matter would scarcely be likely to be brought by consent of the parties (as it must be) before a law-applying tribunal. Indeed, according to Gustav Radbruch's well-known observation ('Legal Philosophy' (transl. K. Wilk, 1950)), in *20th Century Legal Philosophy Series*, vol. iv, p. 43, at p. 212) which must be accepted at least within the limits where the supposed *silence* is deliberate, there is no *silence* of the law at all. The law is rather regulating the facts but in a negative manner.

What M. Siorat calls *social insufficiencies* would, in so far as they came before law-applying tribunals, usually consist of silences which in fact were unintentional (*imprévues*), but which a court seeking to follow M. Siorat's categories would feel free to characterize constructively as either mere *lacunae* or as 'social insufficiencies'. To this extent the court would then be free (as the present view holds that it is on other grounds) either to decide the case or to declare a *non liquet*. There is thus a concealed meaninglessness in the distinction which the author treats as basic; and this is a source of continuing difficulty throughout the book. Thus when negotiators of a boundary line fix the line in words by reference to certain 'highlands' commonly supposed to exist, and in fact there are no such highlands, is the result, as regards the legal principles available for drawing that part of the line, a social insufficiency or a mere gap (*lacuna*)? The author treats it as a case of the former. But why? and why not a mere *lacuna*? Why, indeed, is it either of these, as distinct from a mere mistake of fact? See *op. cit.*, pp. 164 et seq., 186 et seq.

A third difficulty, perhaps more basic, is that the author is operating with only the three modalities of the legally *obligatoire*, *interdit* and *permis* (p. 199), and without the category of 'legally neutral' (neither forbidden nor permitted). His treatment therefore assumes a logically closed legal order. Since he rejects the residual negative principle, which is one main means of 'closing' a legal order, he can only close it by attributing to the courts the legal power, as well as the obligation, to fill every gap. Consistency should thus have brought him to Sir Hersch's position. Yet *per contra* he insists that there are cases in which a court can and even *must* declare a *non liquet*. This can scarcely be affirmed as a legal proposition, once the residual negative principle is rejected. To say, therefore, that a court *can* declare a *non liquet* means rather that it is legally indifferent whether the court does or does not do so, that this choice is a 'possible' one within a space devoid of international law, rather than one authorized by a rule of that law. 'Can', in short, imports in this context not a 'deontic' but an 'alethic mode' in Henrik von Wright's terminology. (See his *An Essay in Modal Logic* (1951), p. 2.) Or, in the present writer's earlier formulation, 'there is, as it were, a potential *non liquet* as to whether there can legally be a *non liquet*', and 'the day to day tasks of tribunals may go on for decades without the final word being said about it' (Stone, *op. cit.*, above, p. 125, n. 2, at p. 163).

<sup>1</sup> p. 200.

thesis that the prohibition of *non liquet* is an indisputably established *positive* rule dependent on its other possible source. This is the provision of Article 38 (1) (c) of the Statute of the International Court whereby the parties to the Statute have agreed that the court shall apply 'the general principles of law recognised by civilised nations'. In so far as there are here embraced principles arising *in foro domestico* as well as in the relations of States, Sir Hersch's thesis may succeed under this head, even though it fails to meet the requirements of international customary law.<sup>1</sup> Yet here, too, the thesis encounters the following difficulties, at any rate in so far as it purports to generalize for the international legal order as a whole.

(1) The Statute of the Court, despite its wide range of acceptance, is not yet a document binding on all States.

(2) Even for States which are parties to the Statute it is questionable whether Article 38 (1) (c) establishes a rule binding on them in proceedings before courts or tribunals under instruments lacking any corresponding provision.<sup>2</sup>

(3) Even for States which are parties to the Statute it is questionable whether Article 38 (1) (c) establishes a rule binding on them in disputes as to their legal relations which they have not agreed to submit to any tribunal. This point is more important than may at first sight appear. Sir Hersch (and other learned writers) regards the prohibition of *non liquet* as a kind of corollary of the principle of the completeness of the international legal order as a whole, and the latter as 'a general principle of law recognised by civilised nations'. Yet, however much we may hope for a different state of affairs, we must certainly acknowledge that the range of relations between States embraced by the international legal order is vastly wider than the range of such relations which have come, or may in the foreseeable future come, before the International Court of Justice. The clarification and determination of the unadjudicated range of relations must still be governed by the more traditional processes of State action, interaction, negotiation and co-operation. In so far as Article 38 (1) (c) is an instruction to the International Court concerning cases which come before it, it is not clear in what sense it can bind (as distinct from affording more or less persuasive analogies for States, whether parties to the Statute or not) in cases which do not come before the Court at all. Only a vast extension of the area of general State submission could substantially reduce this difficulty; and we have had occasion to observe that such an extension would be likely to present both the technical legal issues and the policy issues of the *non liquet* question in a radically different light.<sup>3</sup>

Only subject to these difficulties and limitations does it seem correct to

<sup>1</sup> Cf. Lauterpacht, *op. cit.*, p. 205.

<sup>2</sup> Cf. Stone, *op. cit.*, above, p. 125, n. 2 at p. 157.

<sup>3</sup> See above, pp. 138-9 and below, pp. 153-4.

assert, as does Sir Hersch,<sup>1</sup> that Article 38 has elevated the principle of the completeness of the legal system (with its corollary of the prohibition of *non liquet*) into a principle of international law. These limitations are such as to prevent Article 38 (1) (c) serving as an adequate treaty basis of his thesis that the prohibition of *non liquet* is a general rule of positive international law.<sup>2</sup>

Sir Hersch offers the further point that Article 38 (1) (c) makes available 'resources of substantive law' which ensure 'that there would always be at hand . . . a legal rule or principle for the legal solution of any controversy'.<sup>3</sup> Whether or not this view is supportable depends on the various competing meanings of the term 'general principles of law recognised by civilised nations', a matter more fully canvassed above.<sup>4</sup> The learned writer offers the paraphrase: 'the resources of substantive law embodied in the legal experience of civilised mankind—the analogy of all the branches of municipal law and, in particular, of private law.' If his argument were to be held to this formulation, it might be questioned whether the confidence can be warranted that such existing 'resources' as they are actually found will make 'certain' that a legal rule for the 'legal solution' of 'any controversy' between States will 'always be at hand'. Certainly the present writer cannot share such confidence in our age of dynamic economic, social and political change. And similar doubts by distinguished writers have been expressed in even less dramatic times.<sup>5</sup>

#### VIII. THE JUDICIAL RECOMMENDATION OF 'DESIRABLE MODIFICATIONS'

Despite this, however, Judge Lauterpacht's 1958 paper has opened the path for a decisive break-through in this fascinating tangle of theory. The main thesis there re-elaborated means that an international tribunal must determine the case before it, even though it can find no clear existing law of relevant content. His thesis that there can be no *non liquet* thus means that the court must decide every case with such juristic resources as it can marshal, including, of course, 'the general principles of law'. And this in turn means that the court must somehow or other develop or create out of these resources rules of a content which will yield an acceptable result in the particular case. Clearly, as we have now shown to be common ground, the view that *non liquet* is prohibited implies a law-creating function for international tribunals as inescapably as it does in municipal systems.

Yet after reasserting that the court is prohibited from refusing to decide a case on ground of *non liquet*, Judge Lauterpacht turns his careful attention to the duty of a court, after thus deciding the case according to such law as

<sup>1</sup> Op. cit., p. 205.

<sup>2</sup> p. 205.

<sup>3</sup> Ibid.

<sup>4</sup> Above, pp. 145-6, and literature there cited.

<sup>5</sup> See, for example, N. Politis, and other literature cited in Stone, op. cit., p. 156.



it can find or devise, and rendering a binding judgment on that basis, *to go on to consider whether the rule that it has applied and the conclusion which it has reached are desirable ones*. And he discusses at considerable length whether, in case the court is convinced that the result it has reached is unjust or inconvenient, the court should *after rendering a binding judgment embodying that result* proceed to explain why the law which it has applied ought to be modified, and recommend to the parties that they should by mutual agreement institute 'desirable modifications' (which the court may presumably indicate) of the legal *status quo* created by the judgment itself.

All this reads well enough for municipal lawyers accustomed to the occasional judgment in which the court criticizes the law which it feels nevertheless bound to apply to the instant case. But there are several reasons why it does not read quite so convincingly in the context of a supposed rule prohibiting an international tribunal from declaring a *non liquet*.

1. In the first place the municipal judge's recommendation makes sense as being directed to a legislature which has the legal power to change the law applied by the judgment, even if (as is usually the case) only one side to the litigation would want to quarrel with it.<sup>1</sup> Such a plea by an international tribunal to the disputant States themselves, however, seems rather futile unless we assume that the party who has won a hard-fought litigious victory will forthwith hand over the spoils on the recommendation of the tribunal.

2. In the second place, even if the litigating parties did agree *inter se* to such a 'desirable modification', that would still leave the judgment standing, so far as future litigants are concerned, as a general statement of presumably binding 'bad' law.

3. The third and most critical point, however, is that Judge Lauterpacht should, in this *non liquet* context, regard it as a situation likely or even possible to arise, that the court would disapprove of the content of the rule which it has itself fashioned to apply to the case. For in the characteristic case where the *non liquet* issue is worth discussing the content of the rule to be applied, and therefore the result to be reached, would *ex hypothesi* be sufficiently absent or indeterminate to give the court ample room for choice. And assuming that there is such room it would seem, to say the least, unlikely that the court should choose a content for its rule which yields a result which it then feels impelled to condemn as grossly unjust or inconvenient. Why should a tribunal, as it were, choose a content so unacceptable as to impel it to exhort the parties immediately to agree to 'desirable modifications'?

If this position were taken in a more general discussion of the judicial

<sup>1</sup> Even then, of course, such a recommendation often gets only very tardy attention from modern legislatures with congested working calendars.

process it might be understood as asserting the judge's duty to apply the law, in so far as the law is clear, regardless of his approval or disapproval of it; and his liberty, at the same time, to criticize *de lege ferenda* the law he is thus compelled to apply.<sup>1</sup> In *that* context the judicial right and duty to expose the badness of the law, after duly applying it, is reasonable enough. But it is not in any such context that anyone in the *non liquet* controversy has ever suggested that the court should or may declare a *non liquet*, or otherwise decline to decide. It is outside this, and rather in the contrasting context, where no applicable content of an existing rule of law (i.e. one existing prior to judgment) can be ascertained, that the *non liquet* problem arises. Here it is agreed that the only possible alternatives for the court are either to declare a *non liquet*, or to proceed to fashion a rule for the case as best it can. And it is in the course of insisting on this latter alternative, and as a kind of concession to meet those who have questioned the wisdom of placing such heavy legislative responsibility on judicial shoulders by the prohibition of *non liquet*, that judicial freedom to exhort is now declared.

Sir Hersch, in short, is proposing to mitigate the burden of the court's 'legislative' role by saying that, while the judge *must* perform the role, he is free immediately after he has done so to condemn his own handiwork as unjust or inconvenient and the like. Yet, it is again stressed, we are discussing the area in which *ex hypothesi* the judicial capacity to choose a just and convenient rule is uninhibited by any clear settled law. If it is to be assumed that judges have the wisdom and foresight to criticize the rule they have just created, and make recommendations for desirable modifications of it, why would this wisdom and foresight not have been available at the moment of decision so that they could have fashioned a better rule?

### IX. THE FINAL POLICY ISSUES BEHIND THE *NON LIQUET* DEBATE

Nevertheless, the position under examination does (in the present view) take us an invaluable step forward in this field of knowledge. It makes clear that among all the meta-legal and technical-legal issues, one practical issue is becoming recognized by both sides as central to the *non liquet* argument, namely—Will the progress of international law in the new fields thrown up by our present dynamically changing world be safer in the hands of tribunals enjoying wider compulsory jurisdiction and prohibited from refusing to decide for lack of law, than it will be if left to be worked out in the play of practice, including of course the possibilities of conflict, negotiation and compromise? At first sight the answer seems so plain as to be statable in three rhetorical questions. First, is it not more important that the law

<sup>1</sup> And the case of the court's duty to apply a rule which it believes is out of date, but not sufficiently so to allow it to say that desuetude has destroyed its binding force as a rule of customary international law, would be only a special case of this.

be settled than that it be settled right? Second, are not orderly processes of adjustment by impartial third-party determination preferable to the chaotic play of the selfish interests of the disputants? Third, is not even badly adjusted law preferable to conflict and war, especially in a nuclear age? The present writer seeks in this formulation to do more than justice to such arguments before addressing himself to them.

For it is believed that these questions are substantial and not merely rhetorical ones, and that no clean, confident, general 'Yes' can be given to any of them. The first question assumes that the bad law yielded by the decisions in question will 'stick'—that it will be 'settled'. That, however, is a central question here at issue; and it can only be overlooked by assuming glib analogies between municipal and international societies. In municipal society, whence the truism comes, there is a means independent of the disputants' wills of further change in intolerably bad law; and in the meanwhile there is an executive arm to make the bad law 'stick'. Neither of these guarantees is available internationally. As to the second question the real difficulty is again concealed by assuming that in every type of case where law has to be fashioned for new situations, the *lis* will not arise until sufficient knowledge and experience are available to base a workable adjustment. For unless the adjustment is workable then the answer to the question may have to be 'No' instead of 'Yes'. The chaotic play of the selfish interests of the disputants has at least this basic advantage as a channel of approach, that the more chronic the conflict arising from the play of interests, the more knowledge and experience are likely to be available for basing a compromise. And it may well be an ill service both to the long-term abatement of international conflict, and to the chances of growth of a body of law that will subserve this abatement, prematurely to give one disputant an armour of vested legal right to repel demands for compromise whose merits may only be properly assessable as later knowledge and experience accumulate. The trouble about the third question is that it assumes that 'badly adjusted law' and 'conflict and war' are mutually exclusive alternatives; yet in fact conflict and war may arise from badly adjusted law. Conflict may well be accentuated by the rendering of judgments based on inadequate knowledge and foresight, whose effect is to entrench one party still more obstinately behind the newly devised but ill adjusted law.

In an article not consciously directed towards the *non liquet* problem at all, R. D. Scott<sup>1</sup> has made a telling contribution on the present point. After a close study of the judicial and political history of disputes between the American States concerning river waters, he concludes that generally where

<sup>1</sup> 'Kansas v. Colorado Revisited (1958)', 52 *American Journal of International Law*, 432-54. Cf. de Visscher, *Theory and Reality in Public International Law* (first publ. 1954, trans. P. E. Corbett, 1957), p. 332.



there was a resort to adjudication this seemed to block, apparently for ever, the possibility of agreement. 'Once a State is certain about its rights, or part of them, these rights will stand in the way of easy agreement. . . . Self-interest served by a technological solution based on the present and foreseeable needs of the respective nations of the basin will induce agreement. . . . The better road is through compacts, technology and self-interest.'

The issue which emerges can be stated concretely if we assume (as is surely not quite fantastic at this stage) that the United States succeeds in establishing a space station from which regular intelligence can be relayed to its home bases as to the state of defence preparation and readiness of its prospective adversaries. Let it be assumed that the lawfulness of this intrusion *longa manu* (as it were) into its territorial privacy were challenged by another State, and that the dispute was otherwise within the International Court's jurisdiction. What should be the attitude of the Court? Should it be *free* to say that, after hearing counsel and experts, and considering the limits of the existing content of international law, and possible analogies therefrom, it regards these resources as falling short of what is necessary for a sensible determination? Should it, in other words, be free to declare a *non liquet*, and leave the rule to emerge from the opposed positions of the parties, whether by express compromise or tacit acquiescence, as experience develops in the relevant technological and military techniques?

Judge Lauterpacht would presumably say that this kind of answer is not open, and that the Court would have to decide either for the Applicant (if it can find some rule or principle by analogy from which the Applicant's claim can be supported), or (if it cannot) then it must rule that the Respondent's conduct is lawful.<sup>1</sup> The basis of the former alternative would *ex hypothesi* lack some of the foundations of knowledge and experience essential to wise judgment. The basis of the latter, on the adversary principle, would be merely that the Court did not feel that it could from the existing juristic resources fashion any rule which would base the opposite conclusion. This, on the hypothesis here assumed, can only be a wise judgment by the merest chance. Nevertheless, it would stand, on the usual assumptions,<sup>2</sup> as a firm authority for the proposition that no remedy is available under international law for long distance intrusion into the territory of a State from outer space. The Powers technologically in a position to commit this intrusion would thereby, before the implications of this new kind of power are fully envisaged, be given legal immunity in respect of it.

We may follow out a little further the gist of the respective arguments through this hypothetical case. Sir Hersch would apparently admit, in terms of his latest thesis, that judgment either for the Applicant or Respon-

<sup>1</sup> See the refinements on this point, above, pp. 139-40 and p. 140, n. 2.

<sup>2</sup> Partly, of course, on the basis of the erroneous assumptions discussed above, pp. 134-5.

dent State might be unjust, inexpedient or in other respects unwise. For he would palliate it by authorizing the Court to exhort the parties to enter into an agreement bringing 'desirable modifications' to the law as fashioned by the Court's judgment. His position, we have submitted, does not take into account the effect of the prior rendering of a binding judgment based on defective law in increasing the intransigence of the successful State, and in reducing therefore the very chances of compromise which the judicial exhortation attached to the judgment is intended to promote.<sup>1</sup> But our concrete example brings out an even stronger paradox. For the main reasons why the binding judgment in such cases is likely to be unjust, inexpedient or unwise, namely, the lack of available knowledge and experience, and juristic resources, *at that time*, must also surely prevent the exhortation towards desirable modifications *at that very time* from being any more just, expedient or wise, at any rate as to any precise indications of what the 'desirable modifications' ought to be.

It may well seem ungrateful to examine so minutely the value of this important concession of Judge Lauterpacht for cases within the range of the *non liquet* controversy. It is done, however, in no ungracious spirit. It is rather that the difficulties into which the concession has led display, better than they have ever before been displayed, the central policy issues in the whole matter. How much *law-creating* responsibility can we sensibly place on international courts in a world as changeful as ours, and in the absence of any organ for correction of judicial errors? At what point does the maxim that it is more important that a case be *settled* than that it be *settled right* defeat itself? May not the effect of 'settling' a case by legal judgment on an inadequate basis of knowledge and experience be not to settle it at all, but only to exacerbate the process of conflict by prematurely encouraging one side to a more intransigent posture?

Nor does the distinguished author leave us merely to speculate on this aspect. On the contrary, he is rather concerned to stress that it is *not* 'the function of courts to eliminate any particular cause of friction between the parties to a dispute—except in so far as tension can be removed, or reduced, by the realization that legal justice has been done and that a decision has been reached by a method more objective than the *ipse dixit* of an interested party'.<sup>2</sup> And he adds, on another page, that 'the prohibition of *non liquet* sets the seal of legal finality upon every dispute regardless of the nature of its perplexities'.<sup>3</sup> It must be obvious from the above analysis that the reduction of tension by 'legal justice' may sometimes be outbalanced by an increase of tension from the same source, especially where rules are sought to be structured for new problems without acknowledgement that this involves *law-creative* policy-making. Nor can the nature of such an enter-

<sup>1</sup> See pp. 148-9.

<sup>2</sup> p. 200.

<sup>3</sup> p. 218.

prise be concealed by invoking the ambivalent notion that the international legal order is always 'complete'. Sir Hersch may say that 'the question whether the existing law is . . . in accordance with justice and reason has nothing to do with its completeness'.<sup>1</sup> Yet in those areas with which the *non liquet* problem is concerned, what he terms 'the existing law' is rather law which his view of *non liquet* would compel the court to create. And it is (with respect) simply not acceptable for these areas to say that the court is not to be concerned with whether the law it is creating is 'satisfactory' or 'in accordance with justice and reason'.

#### X. A REVISED VERSION OF THE 'DESIRABLE MODIFICATIONS' PLEA

Before leaving this matter there may be mentioned, for future exploration, a possible limited meeting-ground for divergent viewpoints. In those situations in which the present writer would say that a court ought to be free to declare a *non liquet*, it would be of great value if the court were to accompany its declaration of *non liquet* with indications concerning the desirable lines of future development of the law by practice and compromise as the court at present sees them. Naturally these indications could be in no way binding, both because they would not constitute a judgment in form, and because *ex hypothesi* they could be only tentative, hesitant and provisional in substance. Yet it might be that after hearing both parties and adjusting its mind to the difficulties, an able court could make a valuable contribution by way of guidance, or admonition, in such new areas of international State relations. The effect, of course, of this suggestion would be to leave to the court in a *non liquet* case (if the court cares to assume it) not, indeed, the role of conciliator, but that at any rate of a wise, candid and informed counsellor of the disputants. Would not a legal order in which this were possible be more amenable to progress through agreed 'voluntary modifications' or other *inter partes* adjustments, than one in which undesirable solutions were first sanctified by the supposed rule prohibiting *non liquet*?

#### XI. *NON LIQUET* IN RELATION TO THE EXTENSION OF COMPULSORY JURISDICTION

One other aspect of the *non liquet* problem, as it affects the role of law in conflict management, should perhaps be recalled at this point. The point has been made elsewhere that a main difficulty in treating the absence of cases in which a *non liquet* has been declared as establishing a rule prohibiting such declaration is that the proportion of disputes submitted by States to arbitration or judicial settlement has been hitherto comparatively small. Moreover, in a large number of the cases submitted, the submission was

<sup>1</sup> Ibid.



*ad hoc* or of narrowly delimited classes of dispute. This means that the parties usually had ample opportunity to envisage all aspects of the particular matter before the dispute or class of dispute was actually submitted. The *non liquet* problem, it has already been hinted, assumes a different character in this situation from what it would have with any greatly extended range of submission. And this difference would become momentous if what is assumed is a compulsory jurisdiction of the court over all disputes whatsoever, as often advocated under 'the rule of law' concept. Yet the juristic positions which deny the possibility of *non liquet* are usually also concerned to deny that any disputes can be non-justiciable, and even to press for the full acceptance without reservations of the compulsory jurisdiction of the court over all disputes.

Envisaging the problem in this context, Émile Giraud has argued<sup>1</sup> that the need for codification arises in part from the fact that, contrary to municipal analogies, we cannot expect judges to be accepted as agents for settling and developing international law, at any rate under general submissions *in futuro*. In his view this should lead us, as a next step, to press on with the codification of international law. Though he recognizes the difficulties confronting such efforts, and the disappointments of the last thirty years, he believes that we must still persist in it as a major objective. He goes, indeed, so far as to say that even if the only codification possible constitutes a setback to the substance of the law, it is preferable to 'juridical anarchy where each does what he likes'.<sup>2</sup>

E. D. Dickinson, on the other hand, while accepting the position that the instability and unpredictability of international law is a main cause of the shunning of international adjudication, sees no hope of rendering international law more stable and predictable. In the present world, he thinks, a law that was stable and predictable would be rather meagre and sterile. His conclusion is that our only course is to try to give Governments faith in judicial processes, and persuade the newer States that third-party settlement is normal.

Either of these prescriptions would constitute a great advance if there were any early chance of it being carried out. It is regretted that, in the present view, there is no serious chance of early success in either.<sup>3</sup>

## XII. NON LIQUET AND THE RELUCTANCE TO SUBMIT TO THIRD-PARTY JUDGMENT

It is also of some importance to observe that many of the basic questions

<sup>1</sup> In Jenks, *Rapport Définitif . . . Institut de Droit International*, Commission XXIV, *Compétence Obligatoire des Instances . . . Internationales* (1958), at pp. 93-95.

<sup>2</sup> *Ibid.*, p. 95.

<sup>3</sup> For the reasons as regards the codification drive see Stone, 'On the Vocation of the International Law Commission', *Columbia Law Review*, 57 (1957), pp. 16-51.

concerning third-party settlement, including not only *non liquet*, but also justiciability, range of submission, scope of reservations, as well as (it may be added) grounds of and forum for testing nullity, and non-enforceability of duties to appoint arbitrators or to frame the *compromis*, all appear to be interconnected *at the focal point of the policies of the submitting State*. As the Dutch Government well observed in relation to the Draft Code of Arbitral Procedure, it would be a dubious victory for third-party settlement to close loopholes of escape from agreements to arbitrate, if the net effect is to discourage States from submitting to arbitration at all.<sup>1</sup> Again, the wide agreement condemning the use of reservations so extravagant, or of time limits so exiguous, that they render the submission to the court almost illusory, does not necessarily mean that anything can be done about them. Even if these 'abuses' were barred by an Additional Protocol the only net effect would probably be that States which did not wish to comply would simply refrain from submitting or from continuing to submit to the jurisdiction at all. So, similarly, if it is our benevolent strategy to persuade the major groupings of mankind to extend the range of their submission to third-party judgment, we may not be furthering that objective by insisting that when States do submit they impose on the tribunal both the power and duty to decide one way or another, *ruat coelum*, however sceptical the court may be as to the value of the rule which it has to improvise for the occasion.

Émile Giraud has well observed<sup>2</sup> that we cannot assume, merely because international arbitration has in the past played an important role in developing international law, that therefore the legislative power in international judges can be thought of in the same way as we think of such power of municipal judges. In a municipal society, he observes, there is sufficient homogeneity to allow the attribution of this power to judges. (He could have added that since there is an effective legislature to correct errors, the power is also the more easily tolerated; and that since there is an effective executive it is the more readily acquiesced in.) The creation of law by past international arbitrations, he points out, was mostly in cases of existing disputes submitted *ad hoc*, in which 'each party knew, as a practical matter, what was the range of the case (generally a very limited one), and had accepted by its submission the risk of losing'. Moreover, these past arbitrations were usually between disputant States whose ethical and legal systems were not too far apart. But, he observes, the contemporary problem is quite different, both because the question at present agitated is as to the obligation to submit *future* disputes of which it is impossible in

<sup>1</sup> For the above reason it is intriguing to find that É. Giraud, who is hardheaded enough to condemn as illusory attempts to promote arbitration by technical studies, because the real obstacles to its promotion are political, regards the adoption of the Draft Code of Arbitral Procedure as of major importance (see Jenks, *Report*, p. 104).

<sup>2</sup> In Jenks, *op. cit.*, above, p. 154, n. 1, at pp. 94-95.

advance to know the nature, or what interests will be involved; and because many prospective disputant States are divergent, not only in their interests, but in the ethical and legal foundations of their societies. 'Under these conditions, personal confidence in the judge or arbitrator cannot be a determining factor. Governments will not submit to judicial or arbitral settlement unless they are more or less in accord as to the law which ought to be applied.'

The jurisdictional problem and the *non liquet* problem thus merge in a socio-political sense at this point.<sup>1</sup> Here, as with the other escape valves above mentioned, the mutually compensating areas of manœuvre available to States which do not wish to submit to compulsory adjudication make it highly unlikely that much can be gained in promoting effective judicial settlement by establishing a prohibition of *non liquet*, even if the incidental evils of such a rule could be avoided.

### XIII. THE SOCIAL, POLITICAL AND ECONOMIC BACKGROUND OF THE *NON LIQUET* CONTROVERSY

Finally, if discussion of the *non liquet* problem is to be constructive, as it seems to the present writer, it should proceed in fuller awareness of the nature of the age in which it is taking place. On the physical and biological side we have accelerated and concentrated contacts throughout the globe, transforming by scientific and technological invention the legal significance of the globe's surface and environment, whether below the oceans, at the Poles, in the atmosphere above the land, or in space beyond the atmosphere. We have a rapidly changing pattern of population growth both on the globe as a whole, where population will double within the next thirty-odd years, and as between particular parts of the globe. We have an increasing dependence of national economies on sources of supply of industrial raw materials available largely only from foreign territorial domains. And we have, of course, the established capacity of some nations, whose number may not always remain small, to wreak destruction on large sections of mankind by the use of atomic weapons.

This formidable flood of change on the physical and biological side is matched by psychological, moral and cultural transformations proceeding among almost all peoples of the globe, though at varying paces. There is among many peoples a newly disclosed fragility of what appeared in the light of nineteenth-century optimism to be entrenched moral standards. This fragility may be a product of modern techniques of mass psychological manipulation, or it may be the fragility itself which has made these techniques so highly successful. In either case the implication must be momentous for a traditional international law which addressed itself in its

<sup>1</sup> Cf. Jenks, *op. cit.*, p. 88.



formative period to the conscience and conduct of absolute monarchs. The splitting and dispersal of responsibility for State action in democratic and other complex forms of government, when combined with the impact of the means of mass communication, make the analysis of State policy (and the moulding of policy) a far more hazardous matter than ever before.<sup>1</sup> No less dramatic than their effect on government is the effect of these psychological and moral changes on international conflict and war. What has elsewhere been called the depersonalization of killing is a product not only of technological but of psychological and moral change. Scientists invent the weapons, technicians and industrialists produce them, members of the armed forces release them at great distances from the point of impact, and possibly years remote from the final damage. In so far as the dispersal of moral responsibility through official hierarchies still leaves some moral responsibility in the men who act, this tends to be insulated by space and time from the terrible consequences of action.<sup>2</sup>

These are but a sample of the movements of growth, change and disintegration which form the inescapable context of any attempt to develop, mould and adapt international law as an instrument for the management of international conflict. Judge Alvarez is certainly right when he declares the need for a 'reconstruction' of international law.<sup>3</sup> It is quite another matter whether it is reasonable to hope to advance this reconstruction by placing the main burden of it on the International Court, by prohibiting the Court from declaring a *non liquet* even within the vastly expanded area of compulsory jurisdiction which is often simultaneously advocated.

Sir Hersch has observed that 'with negligible exceptions, international practice shows no instances of a *non liquet*', and he infers that the subject partakes of 'a measure of unreality'.<sup>4</sup> It may be proper to add that, even if this has seemed to be so up to the present, the subject is likely to gain reality in the modern world closely in proportion to the success of efforts to extend the area of compulsory jurisdiction and international disputes.

<sup>1</sup> The modern fashion for the study of decision-making may be in part a nostalgia for the simpler days of yore; the present writer has, with the utmost respect for the distinguished minds who are following this line, more than a touch of scepticism about its future.

<sup>2</sup> For a fuller development of some of these points see Stone, 'International Law and Contemporary Social Trends', *Rocky Mountain Law Review*, 29 (1957), pp. 149-66.

<sup>3</sup> Cf. recently Alvarez, *Le Droit international nouveau dans ses rapports avec la vie actuelle des peuples* (1959). Judge Alvarez does not deal with the *non liquet* problem as such. But the following propositions seem to be implied in his general treatment (see pp. 591-8, esp. 597): (1) the declaration of *non liquet* is not excluded by the nature of the international legal order; (2) in the 'first phase' of development of international law it was the arbitrator's duty to refrain from decision in default of applicable substantive law, unless the parties agreed otherwise; (3) in the 'second phase' the power of tribunals to resort to 'justice' and 'equity' to remedy such default was admitted; (4) in the 'third phase' Article 38 of the Permanent Court Statute made express (though still defective) provision for such default; (5) in the contemporary phase such tribunals ought in face of this default to take into account the new principles arising from the *droit d'interdépendance sociale*.

<sup>4</sup> p. 198.

All who are concerned to promote this extension should also be concerned to extend the understanding of the limits within which it can successfully proceed. Not the least of these limits will be found in the policy aspects of the *non liquet* question here sought to be raised.

#### XIV. GENERAL SUMMARY OF THE PRECEDING ANALYSIS

1. While Sir Hersch reaffirms without serious qualification that international law prohibits a tribunal from declaring a *non liquet*, he insists that this is a rule of positive law established by uninterrupted arbitral and judicial practice, and also by Article 38 (1) (c) of the Court Statute. This shift of the debate on to the level of practice is manifest also in the recent work of M. Siorat, though his inquiries lead him to rather different conclusions.

2. Sir Hersch, as well as M. Siorat, renounces any theory that the principle of the completeness of the legal order and its 'corollary', the prohibition of *non liquet*, are self-evident. The former admits that practice 'may well have gone the other way', and the latter believes that in certain respects it has done so. Both, however, deliberately undertake to establish what are the rules as to *non liquet* on a legal-empirical basis, as distinct from the basis of logical or ontological axioms. Thus, on this point, their design is in substantial agreement with the present writer's position of 1953, that no particular rule as to *non liquet* imposes itself as a mere matter of logic, or of the ontological nature of the international legal order, and that a rule permitting or even requiring the declaration of a *non liquet* is *in principle* conceivable.

The present writer believes that this is a vital advance, opening the way as it does, in the manner summarized in the next paragraph, to an approach to the *non liquet* problem through detailed discussion of the practical consequences of the various possible views in the light of the social, economic, political and military conditions of the modern world.

3. This advance should not be underestimated even though Sir Hersch appears to say that the satisfactoriness of the available rules ('the existing law'), in terms of political and economic justice and reason, 'has nothing to do with' the completeness of law (and therefore with the prohibition of *non liquet*).

For, first, by this attempted extrusion of the question of 'satisfactoriness' from the area of legal judgment, he succeeds only in transferring it to the stage after such judgment. At that point (he thinks) the court may and should give indications to the parties concerning 'desirable modifications' of the binding judgment on which they should agree.

And, second, Sir Hersch's theory of the completeness of the legal system

would appear, on a full analysis to be founded (at least implicitly) on the duty of courts to draw from 'the general principles' of law and of international law rules constituting 'the existing law' for the case at hand. But it is now widely recognized that, in legal problems of any difficulty, a choice usually presents itself between competing general principles each of which may yield different results. Once this is recognized, it must be clear that what Sir Hersch calls 'existing law' will in the more difficult cases be law newly created by the judicial choice. The consideration of the satisfactoriness of the alternatives offering themselves must, then, surely enter into the decision which the prohibition of *non liquet* compels the court to make, and thus influence the selection of the new rule which must be devised to satisfy the thesis of completeness.

4. Since the *non liquet* question is concerned essentially with the most difficult cases, it becomes imperative to recognize that the debate concerning it bears not only on law-applying competence, but even more (as M. Siorat's work ably stresses) on law-creative competence, of judges. For to prohibit courts ever to declare a *non liquet* is to impose on them a burden of law-creation limited only by the novelty and range of the future cases coming before them. And at the present primitive level of any true international legislative power, and in the absence of any effective means of correcting judicial error, unwisdom or improvidence, the assertion that such an impossible burden is squarely imposed by law on international judges should be tested with the utmost care.

5. The course of arbitral and judicial practice offered by Sir Hersch as 'indubitably' establishing the supposed 'positive' rule of international law prohibiting declaration of *non liquet* in all cases and by all tribunals must therefore be so tested. This practice reveals clear support for a rule that international law does not prohibit a court from deciding a case even if it finds absence or obscurity of pre-existing law. It also, by way of corollary, supports a rule conferring law-creative authority on the court in such circumstances. Another way of saying this is that the course of practice negates the existence of any rule *compelling* a court to declare a *non liquet* in such a case. But in no sense can this course of practice, whether in terms of holdings or even of mere dicta, be said to establish the far more stringent rule for which it is offered by Sir Hersch, namely, one *prohibiting a court from declaring a non liquet*.

The practice offered is thus in no way inconsistent with the present writer's view that in the *non liquet* type of case the court is *not forbidden*, though it may also be *not compelled*, to decide it by creative decision; and that it is *not forbidden* though it is also *not compelled* (*pace* M. Siorat) to declare a *non liquet*.

6. Sir Hersch's alternative source of his 'positive' rule prohibiting



declaration of a *non liquet* is Article 38 (1) (c) of the Statute of the International Court. Even if it be granted that the rule prohibiting *non liquet* is 'a general principle recognised by civilised nations' *in foro domestico*, a rule so based could not be in the general terms in which the learned writer seems to assert it. It would necessarily be limited in its range to those parties, those proceedings and that Court, covered by the Statute as a treaty instrument.

Nor, on Sir Hersch's paraphrase of 'the general principles of law recognised by civilised nations', can it be said that the possibility of a *non liquet* has in any case disappeared, by reason that those principles are adequate to provide a clear solution for every conceivable case. The adequacy of those principles to provide such a solution, especially in a dynamically changing era, is precisely one of the matters in issue. It is certainly not self-evident, nor has it hitherto been demonstrated; nor does it seem likely that it can be demonstrated.

7. Even if the 'positive' rule prohibiting *non liquet* which Sir Hersch believes to exist is thus not established *ex lege lata*, it is still entitled to a fair examination *de lege ferenda*. When it is thus examined, Sir Hersch's own exposition reveals grave difficulties. Of these, the most serious is certainly the position in which it would place the international judge. It would require him in a *non liquet* type of case, in which he himself mistrusts any solution he can eke out from existing principles, even by the most tenuous analogies, nevertheless to sanctify such solution by embodying it in a binding judgment. It would then, by way of palliative, authorize the same judge to condemn his own handiwork as unjust or unwise or otherwise unacceptable, and to invite the parties to modify it by mutual agreement.

8. A central issue which then emerges is this. At what point does the maxim that it is more important that a case be *settled* than that it be *settled right*, defeat itself? At what point does a legal judgment 'settling' a case on an inadequate basis of knowledge and experience only serve to exacerbate the process of conflict by prematurely entrenching one side behind a bastion of vested legal right?

9. Because no *general* answer to this can be given the present writer believes that it should be left open to a tribunal, in the absence of contrary request by both parties, to decide that the authoritative legal materials and other resources available for judgment do not in the particular case enable it to make a binding judgment. In other words, in such a case a declaration of *non liquet* should be neither universally prohibited nor universally required; it should be admitted that the court itself is in the best position to determine when it should refrain from giving a binding judgment. It is not anticipated that the proportion of such cases will be great; yet they are likely to be sufficiently important for premature ill handling to

prove disastrous. The court should also, in the present opinion, be free to accompany its declaration of *non liquet* with indications to the parties (and, of course, indirectly to other States also) of the lines of desirable development. Such a declaration should be a signal to all those concerned with developing the rule of law among nations, alerting them to the urgent need for study of the elements, juristic as well as other, of a wise legal adjustment of the international relations involved.

10. In order to be fruitful, future discussion of the problem should, in the present view, be conducted consciously against the background of plans for consolidating and extending the compulsory jurisdiction of international tribunals. And, for the same reason, it should be conducted with a vivid awareness of the nature of the present age, and of the fact that many controversies of great novelty are destined to be thrown up by the flood of physical, biological and cultural change which is sweeping relentlessly across the lives of men and nations.

# FREITAS VERSUS GROTIUS<sup>1</sup>

By PROFESSOR C. H. ALEXANDROWICZ

## I

IN 1627, nearly nineteen years after the anonymous publication of his *Mare Liberum*, Hugo Grotius mentioned in one of his letters a work written by Franciscus Seraphin de Freitas in response to his treatise.<sup>2</sup> Freitas was a professor at the University of Valladolid, and the significant title of his work was *De Justo Imperio Lusitanorum Asiatico*. Grotius referred to it in the following words: 'Scriptum est satis diligens et vir dignus cui rescribatur.' But though he considered Freitas 'a man worthy of reply' and though he was urged to answer him he never did so. Instead he suggested in his letter that 'some one of our judges should be sought out and the duty delegated to him', a remark full of irony and perhaps bitterness, written after his trial and imprisonment by his own compatriots whose case he had so ably defended.<sup>3</sup>

*Mare Liberum* was not an academic treatise in the strict sense of the word but was one of the chapters of *De Jure Praedae* which Grotius produced, probably at the request of the Dutch East India Company and which was in the nature of a lawyer's plea relating to a particular case in which the Company was involved. This case arose out of the seizure of a Portuguese vessel in the Straits of Malacca by a Dutch Admiral in the employment of the Company. Its capture was questioned by some members of the Company who opposed the adjudication of the prize by the Dutch Admiralty Court.<sup>4</sup> In defending the case of the Company Grotius dealt in Chapter XII with the general aspects of the Portuguese-Dutch conflict in the Indian Ocean, and the freedom of the high seas as its central problem.

While Grotius pleaded the case of the Dutch East India Company Freitas was chosen to state a case for the King of Spain who was at that time also the sovereign of Portugal.<sup>5</sup> He fulfilled his task with scholarly care and precision, countering Grotius's reasoning chapter by chapter and pointing out numerous mistakes. Grotius himself admitted in another letter<sup>6</sup> that 'my work about the freedom of the sea was conceived in the best patriotic spirit but it was written "aetate juvenili"'. When it was

<sup>1</sup> © Professor C. H. Alexandrowicz, 1960.

<sup>2</sup> Hugonis Grotii *Epistolae* (Amsterdami, 1687), Epistola No. 144, p. 796. Freitas's treatise was published in 1625.

<sup>3</sup> Grotius escaped in 1621 from Holland to France and later became Swedish Ambassador in Paris; see Knight, *The Life and Works of Hugo Grotius*.

<sup>4</sup> Knight, op. cit., p. 81.

<sup>5</sup> Amzalak, *Trois Precurseurs Portugais*, pp. 41-94.

<sup>6</sup> See *Recueil de Burman* as quoted by Guichon de Grandpont in his translation of Freitas's *De Justo Imperio Lusitanorum Asiatico* (Preface).



published he was only twenty-five years old. Indeed, in comparing *Mare Liberum* with *De Justo Imperio Lusitanorum Asiatico* the reader is struck by Freitas's perfect legal erudition and scholastic skill. But while Freitas was an expert in Roman and Canon law and had a profound grasp of the Commentators, Grotius appeared in spite of his young age as a legal reformer of great flexibility and foresight. This is perhaps the reason why Freitas's work, overshadowed by Grotius's spectacular success, has been so utterly forgotten. However, if the history of the classics of the law of nations of the seventeenth century is to be complete, Freitas deserves a proper place among all the other opponents of *Mare Liberum*, particularly Selden and Welwood with whose arguments Grotius dealt in due course.

In considering Freitas's work<sup>1</sup> it is important to remember that it refers to problems arising out of actual State practice in south Asia and the Indian Ocean in the sixteenth and seventeenth centuries. The same is true of *Mare Liberum* which in spite of the generality of its propositions concentrates on the Portuguese-Dutch conflict in the above region and the rôle played in it by the local rulers. Before engaging in a discussion of the legal aspect of this conflict its historical background deserves to be briefly recalled. Vasco da Gama's arrival on the west coast of India marked the opening of a new direct sea route from Europe to Asia, and had in effect a threefold significance—economic, political and religious. It undermined the trade monopoly established by Moorish (Arab) traders, and at the same time attacked the *hinterland* of Islam which drew vital resources from south Asia for carrying out its holy war against Christian Europe. The Moorish trading and navigating community in the East was intimately linked with Venice and with certain Asian ports, particularly the harbour of Calicut on the west coast of India, and it relied on the support of Turkey and Egypt, the latter being the area of transloading of goods shipped from India to European destinations. Spain and Portugal were at that period united under the Spanish Crown and enjoyed in all respects the support of Papal Rome not excluding the conferment on them of a legal title to overseas expansion. The three East India Companies (Dutch, English and French) only gradually came into the picture; the first to appear on the Asian scene in the seventeenth century were the Dutch who were out to break the back of the *Imperium Lusitanorum Asiaticum* irrespective of any ideological conflict. Though these companies were separate legal entities they were endowed by their sovereigns with authority to exercise rights of external sovereignty to the effect that their transactions with other independent powers created rights and duties in the law of nations.<sup>2</sup>

<sup>1</sup> *De Justo Imperio Lusitanorum Asiatico* (1625), and translation into French by Guichon de Grandpont (1882).

<sup>2</sup> See Dr. Kemal, 'The Evolution of British Sovereignty in India', *Indian Year Book of*

## II

The first question with which the historian of the law of nations is confronted in assessing the situation in south Asia and in the Indian Ocean from the legal point of view is this: Did the struggle in this region start in a legal vacuum or was it determined by the existence of certain principles which were observed by all the participants in the local game of power politics in accordance with their various express or implied legal traditions? What was the status of the local rulers with whom the European powers exchanged envoys, concluded treaties and waged wars? In the absence of a precise local system of inter-State law, what was the actual contribution of regional State practice to the adaptation of legal notions concerning sovereignty, *bellum justum*, treaty making and maritime custom to new conditions? Grotius was intimately concerned with these questions and he gave in his *Mare Liberum* a tentative answer to each of them. These answers were no doubt based on a thorough study of the relevant factual material which he must have carried out in the archives of the 'United Company' in the Netherlands, and they were formulated in a manner reflecting the typical Grotian blend of the naturalist and positivist conceptions of law.

In Chapter II of *Mare Liberum*<sup>1</sup> Grotius refers to those parts of the East Indies in which the Dutch-Portuguese conflict developed most acutely, i.e. Ceylon, Java and the Moluccas (which is not an exhaustive enumeration), and says that these countries 'always have had their own Kings (*suos reges*), their own government (*suam republicam*), their own laws (*suas leges*) and their own legal systems (*sua jura*). The inhabitants allow the Portuguese to trade with them, just as they concede to other nations the same privilege. Therefore, inasmuch as the Portuguese pay tolls and obtain leave to trade from the Rulers there (*jus mercandi a principibus exorant*), they thereby give sufficient proof that they do not go there as sovereigns but as foreigners. Indeed they only reside there on sufferance (*precario*). From this Grotius draws the conclusion that 'the Portuguese have no title at all to sovereignty' (*titulus domini*). It is quite obvious that he considered the local Asian rulers as sovereigns capable of entering into diplomatic and treaty relations with European powers and in fact a survey of treaties concluded between them and the Portuguese in the sixteenth and seventeenth centuries supplies sufficient proof of actual State practice in this respect.<sup>2</sup> It should be remembered that the Portuguese, unlike the Dutch, English and French, had no real ambition of establishing themselves as a

*International Affairs* (1957); Hanataux and Martineau, *Histoire des Colonies Françaises*, vol. 5, p. 9; van der Burg and Groot, *The Dutch in Malabar; Selection from the Records of the Madras Government, Dutch Records* (1911).

<sup>1</sup> *The Freedom of the Sea* (transl. by Ralph van Daman Magoffin, ed. by J. B. Scott).

<sup>2</sup> Biker, *Collection of Treaties* (Collecao de Tratados) (Lisboa, 1881).

land power in Asia. Their policy first aimed at controlling the sea routes and eliminating Moorish navigation from them, establishing coastal strongholds and trading stations, and securing a monopoly of trade. Later they acquired certain territories under their own sovereignty such as, for instance, Goa and Malacca. Grotius was definitely aware of these exceptions as he added to the above-mentioned text in Chapter II the following words: 'Non enim de Malacca, non de Goa loquimur, coloniis Lusitanorum', but he crossed the words out from the original text which is only too characteristic of a writer engaged in writing a practical advocate's plea.<sup>1</sup> Grotius supports his opening remarks in Chapter II by the concluding text of Chapter IV in which he excludes the possibility of considering the territories of the East India Rulers as *res nullius* and this opinion found its expression in the attitude of the Dutch to these rulers with whom outstanding questions were settled by a long series of treaties.<sup>2</sup>

Freitas hardly disagrees with Grotius as to problems of sovereignty and treaty making, but he adds in all sincerity that some of the possessions which the Portuguese acquired in the East Indies are based on a title of conquest. In this respect he argues in Chapter II that the Portuguese first acquired certain rights by treaties with local rulers, but that in case of breach of treaty on the part of the latter they had to go to war—and their war was *bellum justum*.<sup>3</sup>

Though Grotius accepted the sovereignty of local rulers and stressed the need of a legal title on the part of a European power for the acquisition of rights in their territories, he nevertheless argued in Chapter I that according to the primary (not secondary) law of nations (*jus gentium primarium*) every nation has the right of free access to, and of trade with, every other nation. Freitas rejects this artificial division between a primary and a secondary law of nations. He considers international law a monolithic system though some of its rules are according to the law of nature immutable and some are subject to change. In case of conflict between the right of access to foreign nations and their sovereignty, the latter must prevail. If Asian rulers conceded to European powers access to their territories, such a concession was subject to change and could be withdrawn, otherwise there would be freedom of trade and navigation for the latter at the cost of sovereignty of the former. That Freitas's argument was legally justified follows from the attitude which the Dutch adopted in their conflict with the English over their rights in the East Indies (Indonesian Islands). The argument of the English in the London negotiations for the settlement of

<sup>1</sup> *De Jure Praedae Commentarius* (a collotype reproduction of the original manuscript, in the Classics of International Law, 1950), p. 97.

<sup>2</sup> Heeres, *Corpus Diplomaticum Neerlandico-Indicum* (1907).

<sup>3</sup> As to their war against Islam Freitas describes it in a true Crusader's spirit as '*bellum justissimum*'; see below.



the conflict (1613) was that after their arrival in the territories in question they established a good title to trade with local communities as all countries should by the law of nations have equally free access to the East Indies for trading purposes. The Dutch reply to this argument was that this universal freedom of the law of nations may be limited by special arrangements. The Dutch claimed priority on the basis of treaties with local rulers whom they considered as 'bound by their own consent'. To this the English rejoinder was that these treaties were unjust and contrary to the law of nature and that anyhow 'the Dutch would not be unaware of what had been written on this head by the "assertor maris liberi"'.<sup>1</sup> Grotius, who might not have expected to be hoist by his own petard,<sup>2</sup> acknowledged the reliance of the English on the above argument but argued again that the Dutch relied on treaties concluded with local rulers and that the 'contract extinguished the liberty of the law of nations'. The effect of these negotiations on Grotius was that in his later writings the statements about the universal freedom of commerce (as limiting national sovereignty) were restated subject to careful qualifications.<sup>3</sup>

It may be noted, however, that while Freitas argued against the principle of free access to territories under foreign sovereignty for trading purposes, he adopted the same principle for another purpose by advocating free access of Europeans to Asian lands for the purpose of preaching the Christian faith. The consequences of adhering to this doctrine will be discussed below. It is essential to stress that its adoption is a corollary to the ideological conflict between Christianity and Islam which was transplanted by the Portuguese from the European scene to the Asian *hinterland* of Islam in south Asia.

However, in spite of these controversies over limitations of sovereignty, Grotius and Freitas seem to have shared the fundamental view that independent and politically organized societies in Asia were endowed with statehood and sovereignty in the law of nations, and this view was by no means an isolated one. As pointed out by Lindley,<sup>4</sup> the majority of the classic writers followed the opinion of St. Thomas Aquinas (as expressed in his *Summa Theologica*) that dominion was based on *jus humanum* and should not be obscured by the distinction between Christian and non-Christian religion and civilization which was based on *jus divinum* and was irrelevant to sovereignty as a temporal matter. Recognition of sovereignty of Asian or other extra-European States found its expression in the writings of Bodin,<sup>5</sup> Franciscus de Vitoria, Ayala, Gentili, Selden and Puffendorf,

<sup>1</sup> Clark, 'Grotius's East India Mission in England', *Transactions of the Grotius Society*, 20 (1935), p. 79.

<sup>2</sup> Knight, *op. cit.*, p. 137.

<sup>3</sup> See Clark, *loc. cit.*, p. 61.

<sup>4</sup> *The Acquisition and Government of Backward Territory in International Law* (1926), pp. 12 et seq.

<sup>5</sup> *Les Six livres de la republique* (transl. by Richard Knowles, 1606); see L. I, C. VIII where

and it was later supported by eighteenth-century writers such as Vattel and G. F. de Martens. Vattel dismissing differences of religion as a relevant factor considered any independent State 'which govern itself by its own authority and laws' as sovereign and as a member of the natural society of nations 'subject to the law of nations'.<sup>1</sup> Martens, a writer with a positivist outlook, who relied to a great extent on treaties between European Powers as the basis of the law of nations, also referred to a long series of treaties between European and Asian Powers which obviously appeared as sovereign participants in extra-European treaty arrangements.<sup>2</sup> Thus, there was an overwhelming body of opinion among the classic writers to the effect that diplomatic and treaty relations between European and Asian Powers were based on a footing of equality and that (as stressed by Grotius and Freitas) the former could acquire rights from the latter by legitimate title only such as cession or conquest.

### III

Assuming that a number of Asian communities were endowed with statehood and sovereignty and capable of entering into transactions with the Portuguese and other European powers which produced rights and duties in the law of nations, we have to exclude the possibility of acquisition of their territories by occupation or discovery. Grotius states in Chapter IV that 'the property and the sovereignty of the East Indies ought not to be considered as if they had been previously *res nullius* and as they belonged to the East Indians, they could not have been legally acquired by other persons . . .', and he adds that 'this is not denied even by the Spanish doctors'. Indeed, Freitas does not join issue on this point. Neither could the Portuguese according to Grotius have claimed 'to have discovered India which had been famous for so many centuries'. Originally Grotius had added the words: 'Alia enim India, alia Americana ratio est' (Chapter II) but he crossed them out from the text though the remark was, contrary to Vitoria's views, quite feasible.<sup>3</sup> Again it might have been inconvenient in a lawyer's plea. Freitas refers to two meanings of the word 'discovery': the geographical and the legal. He does not maintain that the Portuguese acquired a legal title by discovery but he stresses the fact that they opened the direct sea route to India by circumnavigating the Cape of Good Hope. As will be seen below he attaches legal significance to this fact and considers his Sovereign to have the right on the basis *prior tempore potior jure*.

Bodin refers to the sovereignty of the rulers of Turkey, Egypt and Persia and the Caliph (p. 147). Bodin considers 'the Kings of Calicut, of Malachie, of Cambar and of Canor' as vassals of the King of Portugal (p. 147).

<sup>1</sup> *Le Droit des Gens*, L. I, C. I, p. 4.

<sup>2</sup> de Martens, *A Compendium of the Law of Nations* (1789, transl. by Cobbett, 1802); *Cours Diplomatique* (1801); *Recueil de traités* (1817).

<sup>3</sup> 'De Jure Praedae' (Manuscript), op. cit., p. 98.

While Freitas has little to say on occupation and discovery, he engages in a lengthy controversy with Grotius over the title of Papal donation in favour of the Portuguese. In Chapter III of *Mare Liberum* Grotius had referred to 'the partition (of overseas possessions between Spain and Portugal) made by Pope Alexander VI used by the Portuguese as authority for jurisdiction in the East Indies' and had expressed the view that though it had been in the power of the Pope 'to settle the disputes between the Portuguese and the Spaniards' by *arbitration* if asked to do so, the conferment by him of any legal title in the East Indies had no effect in the law of nations. To this Freitas gives a lawyer's as well as a theologian's reply. He admits that the authority of the Pope is spiritual and only indirectly temporal. Thus if he intervenes in the secular sphere, it can only be for religious purposes. He can send missions to non-Christian communities and if they have to go by sea and to engage in trade to keep themselves going ('sub commercii colore') he can confer on them the right of navigation and trade to the exclusion of 'others'. As a theologian Freitas wrote on the assumption of the unity of the Church under the authority of the Pope and he therefore considered the Dutch as being outside this unity and as belonging to the category of 'others'. He also emphasizes in Chapter VIII that the King of Spain had as Count of Flanders acquired sovereignty over the Netherlands and that the Dutch Senate should act in deference to his legal authority. Whatever the objective value of these arguments (which Guichon de Grandpont, the translator of Freitas's work, rightly considers as untenable)<sup>1</sup> it is abundantly clear from the context of Freitas's treatise that the contemplated mission of the Portuguese had, apart from its religious aspect, the undermining of Islam's 'hinterland' in the Indian ocean as its ultimate purpose.<sup>2</sup> At the back of this political purpose loomed the anxiety of the inhabitants of the Iberian peninsula (who had experienced Islamic domination) to check Islam's progress in Asia.<sup>3</sup> It may be relevant to note that the Islamic power block acted on the doctrine of *Jihad* according to which the world was divided into *Dar-al-Islam* (Islamic

<sup>1</sup> Guichon de Grandpont, op. cit., p. 149; but see Knight, 'Seraphin de Freitas: Critic of *Mare Liberum*', *Transactions of the Grotius Society*, 11 (1926), p. 5.

<sup>2</sup> But it is important to emphasize that the greatest Islamic dynasty in south Asia, i.e. the Moguls, were, at the period of Vasco da Gama's mission and afterwards, ideologically outside the Islamic world in the proper sense of the word. Akbar, the Mogul Emperor of India, had applied a policy of tolerance and religious co-existence throughout his dominions. The position was different on the west coast of India which remained practically outside his Empire. The most powerful among its rulers was the Zamorin of Calicut and he, unlike other Hindu rulers on the west coast, was an intimate ally of the Arab trading community which with the support of Turkey and Egypt tended to dominate the sea routes in the Indian Ocean and the Arabian Sea. This explained *inter alia* the friendly relations and treaties of the Portuguese with other Hindu rulers on the west coast who welcomed the latter as their allies against the menacing pressure of Islam. See *The Book of Duarte Barbosa* (transl. from the Portuguese by Mansel Longworth Dames, 1918), vol. 2, p. 74.

<sup>3</sup> Panikkar, *Asia and Western Dominance* (1954), p. 13.



sphere) and *Dar-al-Harb* (the rest of the world). *Jihad* implied a state of continuous warfare between the two which could be interrupted by treaties of a temporary character only as if in the nature of a truce.<sup>1</sup> Freitas states that King Emmanuel of Portugal being in charge of the anti-Islamic crusade in Asia had invited other European sovereigns to participate in it, and moreover the promulgation in 1492 of the Bull 'Inter caetera' of Pope Alexander VI *urbi et orbi* constituted a sufficient notification of this policy to all concerned.<sup>2</sup> Freitas notes the complete lack of reaction on the part of other west European powers and this inaction meant in his view their acquiescence in the exclusive mission of the Portuguese in the East Indies.<sup>3</sup>

However, as to the implementation of this mission, Freitas realized that the legal position of the Pope in relation to non-Christians in the East Indies presented difficult problems. He agreed with Grotius that the Pope, as head of the Church, could not exercise jurisdiction over non-Christians. Already Vitoria had emphasized, in defiance of Spanish policy, that difference of religion did not justify political and military action.<sup>4</sup> Thus the Pope could not make grants to Christian powers at the expense of non-Christians though he could authorize 'missionary' activities in their territories. In trying to reconcile all controversial factors Freitas says in Chapter IX that three legal points occurred to him: first, non-Christians could not be compelled to accept the Christian faith; second, if they did not accept the Christian faith preached to them, they could not for this reason be deprived of their property rights and this also excluded *debellatio* ('non tamen ex eo eos debellare et bonis spoliare licet'); third, that the Pope could himself, or by the intermediary of Christian Princes, secure freedom of preaching the law of Christ in non-Christian countries.<sup>5</sup> The subjects of such countries who were prevented by their rulers from accepting the Christian faith, or from exercising it, in case of conversion, could be absolved from their allegiance to their rulers. The significant conclusion drawn by Freitas from the last point was that the Portuguese could go to

<sup>1</sup> *Jihad* meant, according to Islamic legal theory, *bellum justum*, but it is doubtful whether it reflected the ideology of the Koran. See Nawaz, 'The Doctrine of Jihad', *Indian Year Book of International Affairs* (1959).

<sup>2</sup> The line of demarcation between Spanish and Portuguese overseas interests had been later modified by the Treaty of Tordesillas in 1494, but it lost much of its significance during the period of temporary unification of Spain and Portugal under the Spanish Crown.

<sup>3</sup> There is also another reason for which Freitas supports the preference given to the Portuguese in the East Indies, i.e. their technical superiority. Since the reign of Henry the Navigator, Portuguese experience in oceanic navigation, including ship building, astronomy, geography, the use of instruments, &c., had reached a level incomparably superior to that of other maritime Powers. The spectacular achievements of Portuguese admirals since Vasco da Gama gave full expression to this technical superiority throughout the sixteenth century, and thus the Portuguese claim to monopoly in navigation and trade in the East Indies was, in Freitas's view, entirely justified by the Papal grant (Chapter VIII).

<sup>4</sup> de Vitoria, *De Indis* (ed. by E. Nys; Classics of International Law).

<sup>5</sup> Which excluded the ancient Christian community of St. Thomas on the west coast of India from Portuguese interference; Brown, *The Indian Christians of St. Thomas* (1956).

war with a non-Christian ruler who disregarded the freedom of preaching or preserving the Christian faith and thus a war for the purpose of securing such freedom was *bellum justum*,<sup>1</sup> a conclusion with which Grotius utterly disagreed though he accepted the principle of free access of Europeans to the East Indies for trading purposes. However, Freitas emphasized that in practice the Portuguese waged war only exceptionally against non-Moslem countries,<sup>2</sup> as for instance against the rulers of Calicut and Ceylon as to which Freitas remarks in Chapter XVII: 'Constantinus Brigantini filius Indiae Prorex potentissimum Janafatam in Taprobane Tyrannum debellavit, coroneque Lusitanae subegit anno 1560. . . .' But whatever the policy of the Portuguese in this respect, Freitas made it abundantly clear in Chapter IX that they would always avail themselves of the title of conquest against the Turks and Moors: 'Cum tamen contra Turcos et Mauros bellum ex nostra parte semper justissimum sit.'

It may be mentioned here that one of the legal consequences of this uncompromising attitude towards the Islamic world was the condemnation by Freitas (in Chapter XIII) of alliances between Christian and Islamic powers. Such alliances, if offensive, were illicit; if defensive they were tolerable but fraught with evil results. In support of this legal theory Freitas quotes one of the leading authorities on the subject, Octavianus Cacheranus, whose work under the title *Disp. an Principi Christiano fas sit, foedus inire cum infidelibus* (Taurini, 1569) was later mentioned by Ompteda<sup>3</sup> as an authoritative work on alliances of Christian Princes with infidels.<sup>4</sup>

Thus, while Grotius and Freitas broadly agree as to the application in the East Indies of legal principles relating to acquisition of territory, they disagree fundamentally as to the conception of *bellum justum* and conquest, particularly in relation to the Islamic world.

#### IV

Before discussing the Grotius-Freitas controversy over the freedom of the high seas with special reference to the position in the Indian ocean,

<sup>1</sup> This conclusion meant in fact the transplantation by Freitas of Vitoria's views to the Asian political scene.

<sup>2</sup> Their relations with the Hindu world were not dictated by any doctrinal conception, hence their alliances with the Vijayanagar Empire, the Ruler of Cochin, &c., against Muslim powers and their allies.

<sup>3</sup> *Litteratur des Völkerrechts* (Regensburg, 1785), p. 592. Ompteda refers also to Pott's work on the subject. Pott enumerates as infidels in the first instance Turks, Saracens and Tartars with whom offensive alliances are forbidden to Christian princes even if such alliances contemplated *bellum justum*. He criticizes particularly the treaty concluded between Francis I of France and Turkey against Emperor Charles V; Pott, *C. D. de Foederibus Fidelium cum Infidelibus* (Jenae, 1686).

<sup>4</sup> In Chapter XVIII Freitas refers to the alliances between the Dutch and infidels in the East Indies directed against the Portuguese and deplores the lack of solidarity of the Dutch in the common cause of Christendom.

the question may arise whether any legal régime existed in the above maritime region before the arrival of the Portuguese at the end of the fifteenth century. Grotius must have concerned himself with the question during the study of the relevant factual material, as he included at the end of Chapter VII of *Mare Liberum* the following passage: 'Praeterae accolae totius tractus Africani et Asiatici partem maris quisque sibi proximam piscando et navigando perpetuo usurparunt, nunquam a Lusitanis prohibiti.' In the light of this statement it seems that the various Asian communities had acquired vested rights of fishing and navigation in certain zones adjacent to their territories (as distinguished from the high seas) and thus Grotius draws from this and other arguments the general conclusion that the Portuguese 'are in possession of no right whereby they may interdict to any nation whatsoever the navigation of the ocean to the East Indies'.

As to sources of maritime law in South Asian countries, it may be noted that the oldest comprehensive treatise on inter-State relations in ancient India, Kautilya's *Artashastra*, which originates in all probability from the early period of the Buddhist Mauryan Empire (fourth century B.C.), makes numerous references to maritime regulations (L. II, C. XXVIII). It speaks about the existence of a superintendent of shipping and his jurisdiction over vessels navigating the ocean close to the shore (*Samudrasanyana*) and inland waters. One of his duties was the care of weather-beaten vessels which arrived at harbours. It is most characteristic of this treatise that it prescribes the application of measures against ships bound for an enemy country and the destruction of all pirate ships (*Himsrika*). It also appears from its text that sea routes along the shore were considered preferable to mid-ocean navigation in the Indian sea (L. VII, C. XII). The turning-point in shipping came with the discovery by the Romans (about A.D. 45) of the navigational use of monsoon winds blowing regularly across the Indian ocean which made mid-ocean sailing a practicable proposition.<sup>1</sup> After that a regular import of various luxury goods by sea route from the East to the Roman Empire became an important factor in the latter's economy. Moreover, oceanic trade between India and South-East Asia and the Far East experienced a spectacular development following the expansion of maritime activities of south Indian rulers. The sea route between India and China was in common use in the fifth century A.D. Commercial intercourse developed in the ninth century and up to the fifteenth century Chinese junks frequently arrived on the west coast of India.<sup>2</sup> The Indian Ocean became, therefore, much earlier than the Atlantic or the Pacific a maritime

<sup>1</sup> Rawlinson, *Intercourse between India and the Western World* (1926).

<sup>2</sup> Nilakanta Sastri, *A History of South India* (1955); Panikkar, op. cit., pp. 35-37. Reference may be made to *The Travels of Ibn Batuta* (transl. by S. Lee, 1829) who in the middle of the fourteenth century went on a mission to China and left an account of Chinese shipping regulations relating to the crews of vessels and cargo registers.



centre of far-distant shipping on a big international scale. This tended to lead to the spontaneous growth of a customary régime governing oceanic activities whose primary concern was the fight against maritime anarchy and the suppression of piracy. There were also examples of legislation which regulated controversial problems of maritime law, to mention only the edict of Maharaja Ganapati the purpose of which was to assure 'safety to foreign traders by sea whose vessels might be wrecked on the coast of his territories'.<sup>1</sup> Thus the Indian Ocean could hardly be considered *mare clausum* before the expansion of Moorish navigation and the advent of the European Powers.<sup>2</sup> The situation changed only later with the arrival of the Portuguese in the East Indies who tended throughout the sixteenth century to eliminate Moorish trade and to enforce a régime of far-reaching control of navigation which was *mutatis mutandis* similar to that imposed by the western Powers in various parts of European waters (England, Venice, Genoa, &c.). In the above circumstances it might not be impossible to assume that Grotius in the formulation of his new doctrine found himself to a great extent stimulated by the existence of an ancient maritime tradition in the Indian Ocean which for its vastness and extensive network of sea routes was bound to lend itself to a *mare liberum* outlook. Grotius's distinction between the high seas and territorial zones in which south Asian communities exercised rights of navigation and fishing certainly supports this supposition.

The formulation of this new outlook and its application to the Dutch-Portuguese conflict led Grotius to the denial of all possible titles claimed by the Portuguese in the Indian Ocean whether by occupation, by prescription or custom or by Papal donation. In support of his basic argument that the sea is *res communis* he refers *inter alia* to Roman law and quotes in Chapter V a reply made by Ulpian in which the latter stated that 'the sea could not be subjected to a servitude because it was by nature open to all persons'. To this argument Freitas replies that Ulpian excludes the imposition of a servitude on the sea only by private law and not by public law. The fact that a servitude cannot be imposed by an individual does not mean that it cannot be imposed by a sovereign. Thus though the sea may

<sup>1</sup> While formerly the whole cargo of such ships had been forfeited to the State, the ruler decreed that henceforth nothing but the normal custom duties would be levied on them (*Epigraphia Indica*, vol. xii, 1913-14, p. 188). The appropriation of wrecks and cargoes by rulers was a principle established by immemorial custom but it was gradually modified by legislation and treaty until it disappeared. As to piracy it might have been punishable according to the law or custom of a maritime State (see *Artashastra*) but State practice in the Indian Ocean seems to have evolved a certain identity of customs of oceanic tradition which lifted some principles to the inter-State level. Punishment of piracy as a crime against the safety of traffic and life in the open sea beyond the jurisdiction of any sovereign implied the existence of open oceanic highways.

<sup>2</sup> See Panikkar, *op. cit.*, pp. 35-37. See also Ludovico di Varthemo who, in his *Itinerary from 1502 to 1508* (transl. by J. W. Jones, 1928), testifies to the freedom of navigation in the Indian Ocean.

be *res communis jure gentium*, it can be charged with a servitude including a prohibition against foreign navigation if it is occupied by a sovereign. In Chapter XIV Freitas reiterates this idea and states that whenever the Roman people asserted their right over a portion of the high seas the latter ceased to be public by the law of nations and became public by the law of the sovereign. Though Grotius advocated a progressive doctrine which in due time proved more convincing than the views of his opponents he seemed to have underestimated the difficulty of transplanting conceptions of Roman law to the public law of nations.<sup>1</sup>

Nevertheless, it would be far from correct to consider Freitas an all-out antagonist of the freedom of the seas. In Chapter X he says: 'Maris ergo elementum commune omnibus est quia infinitum ita ut possideri non queat. . . .' In Chapter XI he discusses the use of the sea and the air and states: 'Haec enim naturaliter propter vastitatem, fluxumque vaguum, integre occupari non possunt omnibus hominibus communem decernit Celsus. . . .' The analogy between the high seas and the air space is characteristic. Freitas considers both *res communis* but subject to important limitations obviously dictated by the principle of effectiveness. First of all he emphasizes the existence of maritime zones to which the adjacent territorial State may extend its sovereignty. The question arises what are the limits of these zones. Freitas notes that lawyers found it impossible to agree on this matter—a state of affairs on which we cannot claim to have improved much even today.<sup>2</sup> As it is impossible to find a suitable formula in natural law, the jurisdiction of the territorial sovereign must according to Freitas extend into the high seas according to the possibilities of effective control—a proposition not alien to the tentative policies of some maritime powers today. In Chapter XIV Freitas refers to Grotius's remark about the rights of non-Christian States in Asia whose inhabitants had exercised from time immemorial rights of navigation and fishing in zones adjacent to their territories. He draws from this the logical conclusion that since Grotius admits national jurisdiction in certain portions of the sea, such rights are capable of being exercised not only by the Turks and Moors but also by

<sup>1</sup> Freitas encountered the same difficulties in his discussion of the Rhodian laws to which he refers in Chapter X. Their interpretation leads him to the conclusion that (1) the law of the sea must be considered as a system requiring the establishment of maritime jurisdiction; (2) the customary *lex maris* does not exclude the jurisdiction of the sovereign of the high seas but includes it; (3) it allows to assume the application of the *actio uti possidetis* to the high seas (a doubtful argument which is denied by Grotius); (4) even if private rights on the sea cannot exist, a sovereign may for their protection impose restrictions including tolls on foreign shipping in harbours as well as beyond them. This interpretation seems doubtful as the Rhodian laws tended to support the conception of the freedom of the sea in the East; see Champagne, *La Mer libre, la mer fermée ou exposition et analyse du traité de Grotius intitulé La Mer Libre et de la réplique de Selden ayant pour titre La Mer Fermée*, &c. (Paris 1803); and see below.

<sup>2</sup> Johnson, 'The Geneva Conference on the Law of the Sea', *Year Book of World Affairs* (1959); Waldock, 'International Law and the New Maritime Claims', *International Relations*, vol. 1, April 1956.

Christians. He does not limit national jurisdiction only to territorial zones but accepts its extension generally to the vast expanses of the high seas.

In this respect his views are revealing because he operates on the assumption of a possible quasi-occupation of the high seas by a particular sovereign. The rationale of this conception is explained in Chapter IV in the following way: the high seas cannot remain in a state of lawlessness and anarchy. To avoid a legal vacuum the régime of the high seas must be based on some law, whether national law or the law of nations. It must be kept in mind that in the absence of detailed rules supporting the doctrine of the freedom of the high seas as a practical proposition the sea was bound to be open to anarchy and this was evidenced in all periods of history by the concern of the navigating and trading communities with piracy. Asian history in the pre-Vasco da Gama period testifies to the friendly relations between maritime powers such as those between Buddhist India and China, or those developed during the period of the expansion of the maritime empire of Sri Vijaya. The problem of piracy was no doubt tackled in the inter-State practice of those Powers which seem to have treated the high seas as the common concern *generis humani*. To what extent these efforts were successful could only be ascertained by further historical research. As stated above, the Portuguese and other Europeans did not find themselves in the opening stages of their maritime career in the Indian Ocean in a *mare clausum*. But the monopolizing tendency of the Islamic trading community which carried valuable resources by sea to Egypt (already part of the Turkish Empire) and the opposition of the Portuguese to this potential monopoly which they considered a threat to Christian civilization became a highly disturbing factor in this region. In these circumstances the elements of maritime co-existence in the Indian ocean disintegrated into anarchy<sup>1</sup> and the Portuguese, not without selfish interest, arrogated to themselves the responsibility of converting the anarchy into conditions of security under their own jurisdiction. Freitas emphasizes in Chapter VIII that the Portuguese assumed the exploitation of the new direct sea route between Europe and Asia (which brought Asian merchandise at cheaper prices to the European consumer), and that to this end they diverted from the Arabian Gulf, which was constantly being invaded, the merchandise of India and undermined the uneconomic trade of Turkish merchants in Egypt. In Chapter XII he refers to Portuguese action against piracy in the Indian Ocean, and quotes Seleceus calling it 'ad auxilium purgandi orientis'. Thus the seventeenth century in the Indian Ocean witnessed a state of affairs to which the application of Grotius's doctrine was premature. Its realization proved possible at a later stage at which the

<sup>1</sup> See Lacour-Gayet, *La Marine Militaire de la France sous le Règne de Louis XIII et de Louis XIV*, pp. 13 et seq.; Hall, *History of South Asia* (1955), p. 453.



European Powers were able effectively to combat anarchy and to co-exist within a *mare liberum* régime. Prior to this period the situation in the Indian Ocean called for positive action, and this is exactly the reason why Freitas, far from abandoning entirely the *res communis* conception of the sea, tried to formulate certain principles of national maritime jurisdiction based on quasi-possession of the sea. He states in Chapter XI that in the absence of real occupation of the sea only its quasi-occupation is possible: 'Navigatione et piscatione quasi-occupatur', and he considers such quasi-occupation by the Portuguese as established without interference by the English or the French (Chapter XIV). The Dutch are according to him perfectly capable of establishing a similar right on other sea routes, but they cannot interfere lawfully with those leading to Portuguese trading stations and possessions. It will be seen that the right claimed by the Portuguese emerges as functional in character. In Chapter X Freitas makes it clear that the sea as *res communis* cannot be occupied for the sake of its occupation but rights in it can be acquired in relation to the purpose of their exercise, i.e. the preservation of the security on particular sea routes leading to specified territories. This functional character of quasi-occupation is also true of the maritime zones for, as Freitas states in the same chapter, it can take place only in relation to the land which envelops a particular portion of the sea. It seems that the sovereign asserting the above rights for himself acted in a way also as an agency of the law of nations for the common good of all concerned.

As to the legal title of the Portuguese to maritime jurisdiction, Freitas based it principally on prescription and custom. His main emphasis in Chapter XIV is on the fact that more than one hundred years had elapsed since Vasco da Gama's arrival in India in 1498 and that during this period the Portuguese, without any significant protest on the part of other Powers, asserted and exercised undisturbed control of navigation in the Indian Ocean. In this way they acquired a bona fide right of navigation by immemorial prescription or custom which, with the exception of the Moors, was generally accepted by the free consent of those against whom it was exercised. In this respect Freitas and Grotius differ fundamentally, for though both seem to view the Indian Ocean as practically an open sea before the arrival of the Europeans, Freitas considers it capable of quasi-possession ('mare navigationibus et piscationibus acquisitionis capax esse'—Ch. XIV), whereas Grotius finds any such acquisition of rights irreconcilable with the idea of the high seas conceived as *res communis*.<sup>1</sup>

<sup>1</sup> Under the impact of the opposition to his views Grotius modified to some extent his opinion about the freedom of the seas in his subsequent work *De Jure Belli ac Pacis* (see edition by William Whewell). Grotius says in L. II, C. II (13) that 'the Empire (imperium) of the sea claimed over a portion of it without any other property might easily proceed (from certain claims): Nor do I concede that the law of nations of which I have spoken would stand in the

## V

Before concluding our considerations relating to maritime law it might be interesting to mention briefly the institution of the so-called *cartaz* which was instrumental in the exercise of the control of the seas by the Portuguese. The term 'connotes', according to Portuguese dictionaries, a safe conduct which the Portuguese authorities used to grant in Asia to the friends of Portugal to secure to them safe navigation.<sup>1</sup> The fact that the above term is found in the Arabic vocabulary indicates that the Arabs made early use of *cartazes* for the control of navigation.

Freitas, discussing *cartazes* in Chapter VIII, connects their introduction with the establishment in the East Indies of a Portuguese administration endowed with maritime jurisdiction. They were granted in the name of the King by the Viceroy or by a military or naval commander. Freitas explains the circumstances in which they became necessary and draws our attention to the need of distinguishing friends and allies from enemies on the high seas ('ut foederatos ab hostibus discernarent'). The influence of the Saracens on local rulers in the East Indies increased conditions of anarchy ('dolo ac fraudibus orientis reges in id excitantes') and the situation became even more acute when the Pasha of Egypt and the Emperor of Turkey sent their navies into Indian waters to attack Portuguese ships and possessions ('cum Egypti Campson Turcorumque Imperator ad eandem nostrorum ab India exturbationem classes misissent aliquoties').<sup>2</sup> The *cartaz* appears therefore not only as the means of asserting Portuguese rights but also as an instrument for preserving order and security on international sea routes. Moreover, if we consider the region in question as subject to unlimited maritime warfare (*jihad*) in which regular naval battles were fought in the sixteenth century, the *cartazes* bear certain similarities to navicerts<sup>3</sup> (see below). The authority issuing the *cartaz* applied a meticulous procedure of search to a foreign ship and ascertained whether its intended voyage was undertaken in good faith ('Fide prius illius qui navem conscendit diligenter explorata'). If the investigation proved satisfactory a safe conduct was issued which protected the ship from interference on her

way. It has often been asserted and conceded . . . ' But Grotius emphasizes at the same time that 'He who holds the sea by occupation cannot prevent an unarmed and harmless navigation upon it' (12). Bynkershoek in his *De Dominio Maris Dissertatio* (ch. ix) refers to the fact that Grotius changed his views after the publication of *Mare Liberum* and expressed his doubts about the limits up to which occupation of the sea is possible (reference to *De Jure Belli ac Pacis*, L. II, C. III. 8).

<sup>1</sup> See, for instance, *Dicionario de Lingua Portuguesa* (Lisboa, 1844).

<sup>2</sup> Suleiman the Magnificent of Turkey directed the Pasha of Egypt to support actively the Zamorin of Calicut and the Arab trading community. The Egyptian fleet which entered the Indian Ocean was defeated by the Portuguese in 1538 (see Panikkar, *op. cit.*, pp. 51-53).

<sup>3</sup> Smith, *The Law and Custom of the Sea* (1959), p. 155; Colombos, *A Treatise on the Law of Prize*, p. 216; Higgins and Colombos, *The International Law of the Sea* (1951).

voyage; if the ship sailed without it, she incurred the risk of being stopped and captured with all the consequences ensuing therefrom ('aliter enim a nostris navarchis capi, bonisque omnibus everti et vita et saltem libertate privari possunt'). Freitas remarks in conclusion that the *cartaz* became part of Asian maritime law by immemorial custom and that the Dutch could not ignore it, the more so that even the author of *Mare Liberum* invokes the same law in relation to the Persians, Chinese, Arabs and others in the above region.<sup>1</sup>

A number of examples of *cartazes* were included by Judice Biker in his collection of treaties, and it may be of interest to give the content of at least one of them.<sup>2</sup> In a document issued on 9 August 1613 to Idalxa, King of Bijapur, a local Moslem ruler of an Indian State whose territories extended to the west coast, the Portuguese Viceroy in India states as follows:

'I, Dom Jeronimo D'Azevedo cause it to be known to all who may see it that in consideration of the ancient amity which El Rey Idalxa has with this State and in view of the treaty concluded with him, a licence and safe conduct are granted to him at the request of his ambassador, to enable six of his ships to sail to Mecca (Arabia), Ormuz (Persian Gulf) and other places. In particular I have the pleasure to issue a licence and safe conduct to his ship "Mamady" which carries four thousand khandis (of goods), her captain (Nacoda) being Melique Ambar aged thirty years, and which has for its defence twelve iron swivels (guns), twenty muskets and many moorish weapons so that she may start during the present monsoon from the port of Dabul where she is now, for Juda, and return without taking or bringing anything (anybody) prohibited that is to say Greeks, Turks, Abyssinians, cinnamon of Ceylon, pepper, ginger, iron, steel, lead, tin, timber, brass, saltpetre, sulphur, bamboo, and other things prohibited by the Government; neither will she be permitted to carry Portuguese (passengers) nor to bring horses without a licence, and she will be allowed to bring slaves, male and female of her own nationality only: And if there is any suspicion or information that some of these slaves are Christians or children of Christians, an enquiry will be instituted at the provincial council even if some of these children are not yet baptised; and before the ship departs from the port of Dabul she will be visited and searched by the agent of His Majesty who is at the spot and she will receive his certificate on the back of this document; and on these conditions her voyage both outward and homeward will be without any impediment on the part of the captains of the armadas of this State or on the part of other captains and persons, and all persons notified of the above will fulfill and observe these terms without any question; and this shall be sealed with the seal of the royal arms of the Crown of Portugal.'

Another *cartaz* quoted by Judice Biker was also granted to the King of Bijapur in the same year and is in identical terms. Portuguese *cartazes* granted at a later period, whether in favour of rulers or private merchants

<sup>1</sup> The text may be open to doubt, for Freitas says: 'Hinc fit Batavos sine hoc salvo conductu in Indiam navigare non posse, eo maximo quia incognitus [Grotius] idem ius implorat, quo Persae, Sinae, Saraceni et Ethnici in illis partibus utuntur. . . .' Guichon de Grandpont refers in his translation to the Persians, Chinese, &c., as subject to this law, but this may not give the precise meaning of *utuntur*.

<sup>2</sup> Biker, *Collecção de Tratados* (Lisboa, 1881), vol. iv, pp. 181 et seq.



differ little from the established pattern except that a clause was added to the effect that breach of the terms of the *cartaz* on the part of the grantee will render the *cartaz* invalid and that the ship will be seized and forfeited.<sup>1</sup>

The following conclusions may be drawn from the above: The *cartaz* could be viewed in a twofold way, first as an expression of Portuguese jurisdiction assumed in the Indian Ocean under their quasi-occupation, and second as a sort of navicert applied in conditions of continuous warfare against hostile Islamic powers. Navicerts, as is well known, were introduced during the two world wars and involved the submission of a neutral ship and its cargo by the shipper to investigation in advance. If the latter obtained a navicert from the relevant Allied authority at the point of departure the navicert, although it did not constitute a guarantee against being subjected to visit and search, provided the ship with a passport enabling it to pass easily through Allied maritime controls. Great Britain made navicerts compulsory during the Second World War to the extent that ships not protected by them were deemed to be liable to seizure and condemnation.<sup>2</sup> The *cartaz* covered not only contraband goods but also passengers which was obviously calculated to prevent unneutral service by excluding from the vessel persons liable to be of use to the enemy (Turks, Abyssinians, &c.). The distinction between conditional and unconditional contraband, well known to Grotius,<sup>3</sup> seems not to be reflected in the *cartaz* which enumerates indiscriminately items primarily of use in war as well as merchandise capable of peaceful use only.<sup>4</sup> But merchantmen were entitled to carry guns and weapons for their defence which indicates the existence of conditions of total war. Enemy destination is clearly stated in the *cartaz*, and the mention of Mecca seems to show that ships were also carrying Moslem pilgrims. The exclusion of Christian slaves is a corollary of the Portuguese policy of absolute protection given to their co-religionists. It also follows that the Portuguese exercised the right of search of all vessels on the high seas, a right already implied in the *Consolato del Mare*. But the submission of a ship at the port of departure to Portuguese investigation (which was compulsory) and the issue of the *cartaz* to a bona fide grantee exempted her from interference on the part of Portuguese and other captains and entitled her to their protection. Though some of the *cartazes* do not include a clause referring to sanctions, it is obvious that all ships not carrying a *cartaz* were liable to seizure and condemnation, as expressly confirmed by Freitas.

<sup>1</sup> Biker, op. cit.: *cartaz* granted to the King of Canares on 1 March 1714 (vol. iv, p. 183), to Govinda Das Nana on 15 July 1766 (vol. iv, p. 186), &c.

<sup>2</sup> See also British practice of issuing ships' warrants (Higgins and Colombos, op. cit.).

<sup>3</sup> *De Jure Belli ac Pacis*, L. III, C. I. 5.

<sup>4</sup> This may imply a policy prohibiting all trading with the enemy, a conception well known to English law at the period in question.

Thus the *cartaz* appears as an interesting forerunner of the navicert, and testifies to the early development of specific rules of international maritime law in the Indian Ocean. It would be difficult to ascertain to what extent the *cartaz* was a concomitant of maritime warfare on the one hand and the expression of Portuguese general maritime control on the other. The two functions seem intimately interwoven and the case of each *cartaz* must be judged on its own merits, but no doubt the Portuguese-Islamic conflict must have overshadowed maritime practice.

*Cartaz* arrangements were sometimes made between the Portuguese and Indian rulers by treaty<sup>1</sup> and similar arrangements were also concluded by other maritime powers in the Indian Ocean. State practice on the west coast of India in the seventeenth and eighteenth centuries also affords many interesting examples of maritime custom relating to the identification of ships on the high seas. Diplomatic correspondence between the Marathas and European Powers reveals that a vessel in the open sea was liable to capture if it carried neither a *cartaz* nor a passport nor flew the banner of its own State.<sup>2</sup> Frequent references to banners raise the problem whether there existed a proper law of the flag in the meaning of international law. There seems to be no evidence to this effect, but the flag, jointly with the type and name of the ship and the ship's documents, constituted the ways and means of identifying her nationality.<sup>3</sup> A vessel had the nationality of the ruler to which she belonged and if she was a private vessel her nationality was that of the ruler whose subject the owner was. Thus there existed what may be called in contemporary legal language a 'genuine link' between a ship and her home State.<sup>4</sup>

Wherever maritime custom was oppressive (as in the case of shipwreck) it was liable to be modified by treaty and this applied in course of time also to *cartazes*. It is interesting to note that in the Poonem treaty of 4 May 1779 concluded between the Portuguese and the Marathas, which is one of the relevant documents in the present Indo-Portuguese conflict before the International Court of Justice, it was stipulated in Article VIII that 'merchant vessels of both dominions proceeding to any port and encountering the fleets of both parties or any ship of war shall not be taken

<sup>1</sup> For instance, the treaty of 30 April 1559 concluded by the Portuguese and the ruler of Bakla. In Article V of this treaty the Portuguese Viceroy undertook to give to the ruler four *cartazes* authorizing Bakla ships to navigate freely in the Indian Ocean. Surendranath Sen, 'Historical Records at Goa', *Studies in Indian History* (1930). As to other examples of treaties see Sen, *Military System of Marathas* (1928).

<sup>2</sup> Sen, op. cit., pp. 178, 246, 250; see also *Dutch Records* (The Hague) (transl. by C. C. Remmerswaal in *Shivaji the Great*, by Bal Krishna, 1932).

<sup>3</sup> Edey, 'Description of the Various Classes of Vessels, &c.', *Journal of the Royal Asiatic Society*, 1 (1834); Edkins, 'Ancient Navigation in the Indian Ocean', *ibid.* 18 (1886); as to rules of navigation see Mohi't 1558 transl. by Hammer, *Journal of the Asiatic Society of Bengal*, 1 (1832).

<sup>4</sup> 'If a ship could not prove her national identity she ran the risk of being treated as piratical.

captive on the ground that they possess no safe conduct (*cartaz*) but shall be allowed to proceed freely'.<sup>1</sup> At that period conditions had radically changed in the Indian Ocean. The Portuguese-Islamic struggle had lost its significance and the prospects of co-existence of the several European East India Companies as well as the Asian Powers in the Indian Ocean warranted the establishment of a régime of freedom of the high seas. Martens gave expression to the impending general acceptance of the new doctrine at the end of the eighteenth century when he referred to the four great seas which compose the ocean and particularly to 'the Indian sea about which the great disputes have arisen' and said: 'The sole dominion (of the sea) may exist in the theory . . . the ocean then is free, indeed it ought to be so.'<sup>2</sup>

## VI

Grotius and Freitas were not the only participants in the battle of wits around the freedom of the high seas and the problem of relations between European and Asian Powers. Gentili (1552-1608) concerned himself with these questions earlier and it is interesting to note that his views were in many respects similar to those of Freitas. Though he did not accept war 'on account of religion', he nevertheless stated that, with the Saracens (who were part of the Turkish Empire) 'we have an irreconcilable war'.<sup>3</sup> Consequently alliances of Christian States with infidels against other Christian States were according to him unlawful,<sup>4</sup> and Gentili draws our attention to the fact that treaties concluded with Islamic countries used to provide for cessation of hostilities only.<sup>5</sup> Thus similarly to Freitas but unlike Grotius, he envisages a state of affairs between Christian and Islamic Powers which reflected Jihad and the Christian counter-doctrine to a great extent formulated on the basis of Canon law.<sup>6</sup> In the field of maritime law also there are significant similarities between both writers. Gentili considers the sea *res communis*<sup>7</sup> but submits it to far reaching restrictions. He refers to State practice developed by European maritime Powers such as Venice and Genoa which claimed jurisdiction and sovereignty over the sea adjoining their territories up to 'a distance of one hundred miles and even farther'. As to England he says that 'immeasurable is the jurisdiction of

<sup>1</sup> *The Hindu*, 28 March 1956.

<sup>2</sup> Martens, *The Law of Nations* (transl. by W. Cobbett, London, 1829), p. 163.

<sup>3</sup> *Hispanicae Advocacionis libri duo* (Classics of International Law), L. I, C. XX; *De Jure Belli* (Classics of International Law), L. I, C. XII.

<sup>4</sup> *De Jure Belli*, L. III, C. XIX. But commercial treaties with the Turks were not forbidden, see *Hisp. Advoc.*, L. I, C. XXV.

<sup>5</sup> *De Jure Belli*, L. I, C. IX. The state of undefined warfare had its repercussions in the law of contraband. Gentili discusses the case of an English ship loaded with powder and other merchandise which had been captured on its way to Constantinople by the Sardinians and Maltese. He does not consider 'other merchandise' as contraband goods.

<sup>6</sup> *Hisp. Advoc.*, L. I, C. XX.

<sup>7</sup> *De Jure Belli*, L. I, C. IV.



our King upon the sea'.<sup>1</sup> Though he denies the claims of these Powers to possession of the sea he nevertheless admits that it is possible for them to exercise jurisdiction and a protectorate over it.<sup>2</sup> Thus he comes near to Freitas's conception of quasi-possession of the sea without attempting a more precise definition.

Welwood, in his *Abridgment of all Sea Laws* published in 1613, also adopts a 100-mile limit of jurisdiction and though he advocates otherwise complete freedom of navigation he concedes to a national sovereign the right to impose restrictions on the freedom of fishing in the high seas. To this Grotius gave a critical reply in which he considered the 100-mile limit as arbitrary and anyhow untenable and rejected the dichotomy of navigation and fishing.<sup>3</sup> Ten years after the publication of Freitas's treatise appeared the most formidable reply to Grotius which came from the pen of Selden in 1635.<sup>4</sup>

Without going into further details which would be beyond the scope of this inquiry it must be stressed that Franciscus Seraphin de Freitas deserves his due place among the writers of the seventeenth century who contributed to the clarification of problems relating to the legal status of the sea<sup>5</sup> and to European-Asian inter-State relations. As the title of his work indicates his main purpose was, apart from replying to Grotius, to justify the 'Justum Imperium Lusitanorum Asiaticum' and to contrast it with another imperium 'justum' as implied in Islamic theory and practice. The fact that many of his views were ultimately overshadowed by Grotius's progressive ideas, does not detract from their significance for the development of certain principles of the law of nations such as those relating to

<sup>1</sup> *Hisp. Advoc.*, L. I, C. VIII.

<sup>2</sup> *De Jure Belli*, L. I, C. XIX.

<sup>3</sup> 'Hugonis Grotii Capitis quinti Maris liberi oppugnati a Gulielmo Welwood, etc.', in Muller, *Mare Clausum* (Amsterdam, 1872). Wright, *Some less known Works of Hugo Grotius* (Bibliotheca Visseriana, vol. 7, 1928). Welwood's *Abridgment* was followed up in 1615 by his *De Dominio Maris*.

<sup>4</sup> *Mare Clausum* (transl. by M. Nedham, London 1652; transl. by J. H. Gent, London 1663). Selden divides the British sea into four parts and though he considers the shores and ports of the neighbouring princes as bounds to the south and east, he maintains 'that in the open and vast ocean of the north and west, they [the bounds] are to be placed at the utmost extent of those most spacious seas which are possessed by the English, Scots and Irish'. Among the nations claiming dominion of the sea Selden enumerates *inter alia* the Portuguese and the Turks. But his belief that the East had no conception of the freedom of the high seas seems open to doubt as pointed out by Champagne in his comparative study of Grotius and Selden *La Mer libre, la mer fermée* (Paris 1803), in which he discusses the Rhodian laws with special reference to the Byzantine Empire.

It is interesting to note Grotius's reaction to *Mare Clausum*; he stated in a letter to one of his disciples, Theodore Graswinckel: 'Sed ego libertatem maris dum propugno, meam amisi. Seldenus libertatem maris oppugnans suam recuperavit'; Hugonis Grotii *Epistolae* (1687), Epistola No. 697, p. 287.

<sup>5</sup> Pierre Margry draws our attention to the fact that France was one of the first countries to protest against the Spanish-Portuguese monopoly on the high seas and that she gave support to the conception of *mare liberum* before Grotius; *Les Navigations françaises du XIV<sup>e</sup> au XVI<sup>e</sup> siècle* (Paris, 1867). See also *Controversiae Illustres* (1599), by Vasquez, who opposed the claims of Spain, Genoa and Venice.

sovereignty, acquisition of territory, just war, maritime jurisdiction, contraband, unneutral service, navicerts and others. The application of these principles in Asian State practice in the sixteenth and seventeenth centuries is bound to disprove the view that the Europeans found themselves in Asia in a legal vacuum. Freitas formulates Portuguese rights in the Indian Ocean on the basis of territorial zones and quasi-possession, functional conceptions which in spite of offering a challenge to lawyers were defined with comparatively more caution than those of other opponents of *Mare Liberum*. All of them gave expression to an interim state of affairs prevailing in the seventeenth century which made it still premature to implement the principles of the freedom of the sea.

# THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE, 1954-9 GENERAL PRINCIPLES AND SOURCES OF INTERNATIONAL LAW<sup>1</sup>

By SIR GERALD FITZMAURICE, K.C.M.G., Q.C.

## INTRODUCTORY NOTE

IN the number of this *Year Book* for 1958 (vol. 34) the author completed the second cycle of his articles dealing with the points of general legal interest<sup>2</sup> arising out of the work of the International Court of Justice, which had appeared in volumes 30-34 inclusive (1953-8). This cycle covered the decisions and opinions given by the Court during the period March 31st, 1951-March 31st, 1954.<sup>3</sup> The previous, first, cycle, which appeared in volumes 27-29 inclusive (1950-2) had covered the decisions and opinions given during the period March 25th, 1948 (the date of the first decision<sup>4</sup> given by the present (i.e. post-1945) Court), and March 31st, 1951.<sup>5</sup> The cases covered in these two cycles are listed in footnotes 3 and 5 hereunder. For the purposes of the present cycle it is proposed to try and cover a somewhat longer period, by dealing with the decisions and opinions given between March 31st, 1954, and the end of 1959.<sup>6</sup> The cases thus to be covered will be (litigations): the *Monetary Gold*, *Nottebohm* (merits), *Norwegian Loans*, *Interhandel* (interim measures) and *Interhandel* (jurisdiction), *Guardianship of Infants*, *El Al Aerial Incident*, *Erontier Land*, and *Indian Land Passage* (jurisdiction) cases;<sup>7</sup> and (advisory opinions): the

<sup>1</sup> © Sir Gerald Fitzmaurice, 1960.

<sup>2</sup> As to this, see below in the penultimate paragraph of this Introductory Note.

<sup>3</sup> These were those given in the *Corfu Channel* (three phases), the *Asylum* (merits and interpretation of judgment), the *Injuries to United Nations Servants*, the *First, and Second, Admissions, the South-West Africa*, and the two *Peace Treaties* cases.

<sup>4</sup> This was in the jurisdictional phase of the *Corfu Channel* case. The Court gave its first advisory opinion in the first case of *Admission to the United Nations* in May 1948. In the period from the setting up of the Court in 1946 to the opening of the *Corfu Channel* case in 1948, the Court had no litigious work and was concerned mainly with administrative and organizational matters.

<sup>5</sup> The cases dealt with in this period were the case of *Reservations to the Genocide Convention*, the *Haya de la Torre* case (*Asylum* case, last phase), *Norwegian Fisheries* case, the two *Anglo-Iranian Oil Co.* decisions (interim measures and jurisdiction), the case of *United States Interests in Morocco*, the first and second phases of the *Ambatielos* case, and the *Minquiers and Ecréhos* and *Nottebohm* (jurisdictional phase) cases.

<sup>6</sup> Footnote 4 on p. 1 of the 1958 article (this *Year Book*, 34) should be regarded as amended in this respect and in the light of the list here given.

<sup>7</sup> The decision on the merits of the *Indian Land Passage* case, originally expected before the end of 1959, will not now be given until the spring of 1960. It may, however, be possible to include it in the present cycle by prefacing next year's article (on 'Points of Substantive Law, 1954-9') by a supplement to the present one, covering any points relating to general principles as sources of international law dealt with in that decision.



*United Nations Administrative Tribunal* and the *International Labour Organisation (U.N.E.S.C.O.) Administrative Tribunal* cases, and the *South-West Africa (Voting Procedure)* and the *South-West Africa (Petitioners)* cases. In addition, in connexion with certain points of competence and procedure, notice will be taken of the orders made by the Court in a number of litigious cases that did not go to judgment, such as the other *Aerial Incident* and the *Antarctica* cases.

Of course, as previous readers of this Series will be aware, not every case in each period involves points falling within all of the various main categories into which the author has divided the field, taken as a whole, and which, for each period, are treated of in one or more self-contained articles, namely: I. General Principles and Sources of International Law; II. Points of Substantive International Law; III. Treaty Interpretation and other Treaty Points; and IV. International Organizations and Tribunals (including Jurisdiction, Competence and Procedure).<sup>1</sup> Thus certain cases in the present cycle, such as those of the *Monetary Gold*, the *Interhandel* (interim measures), and the *El Al*, raise virtually no points of substantive law. They will hardly figure in this or next year's articles. On the other hand, they will bulk large later on, in the articles dealing with jurisdiction and procedure. In the same way, some cases are concerned mainly with treaty interpretation or other treaty points. Each case is therefore considered in any given article solely in so far as it involves points coming within the general category of topic to which the article relates. But the cycle taken as a whole will cover all the cases occurring within the period.

Consequent upon this, it may be as well to remind the reader that these articles do not purport to contain a detailed statement, account or analysis of the various cases—still less do they aim directly at a criticism or even evaluation of the decisions or opinions, as such, given by the Court. If an analysis or evaluation (whether of the case as a whole or of any particular part of it) emerges, this is as incidental to—and as a necessary part of—the main task which this Series endeavours to carry out; namely, by considering the various cases against the doctrinal background of international law, to isolate and bring into relief what they have of general interest from the standpoint of international law and procedure as a whole, as opposed to that of the facts of the particular case.<sup>2</sup> It is to discover, elucidate and comment on these general points that this Series was undertaken, and in consequence, as a rule, no more is stated as to the facts of any case than is necessary to enable these general points to be understood in their context. Except in those instances where the general point involved is more or less

<sup>1</sup> See also this *Year Book*, 27 (1950), p. 2; 30 (1953), p. 1; 32 (1955-6), p. 20, n. 1; 33 (1957), p. 203, n. 1; and the Introduction to the 1958 article, volume 34, pp. 1-2.

<sup>2</sup> For a fuller explanation see the introductory paragraphs to the first article in the Series, this *Year Book*, 27 (1950), p. 1, and the Preface to the 1953 article, *ibid.*, 30 (1953), p. 1.

of the essence of the case, the reader must not look for, and will not usually find any analysis of the case itself, as such.

The present article will also illustrate another feature of this series to which attention has already been drawn in earlier articles,<sup>1</sup> namely, that full weight is given not merely to the views and pronouncements of the Court itself, as expressed in its majority decisions and opinions, but also to those of judges delivering separate or dissenting opinions. The reasons for so doing have been explained elsewhere.<sup>2</sup> The point has added importance in relation to the subject-matter of the present article, for during the period 1954-9 the Court as such has seemed somewhat reluctant to make pronouncements on points of general law or principle, and most of these have come from judges delivering individual opinions.

## DIVISION A: GENERAL PRINCIPLES

### § 1. THE SUPREMACY OF INTERNATIONAL OVER NATIONAL LAW

#### (1) *The principle affirmed*

This principle, generally accepted as constituting a *sine qua non* of the efficacy and reality of the international obligation, whether deriving from general international law or from treaty sources,<sup>3</sup> but the philosophical status and implications of which have led to much doctrinal controversy,<sup>4</sup> had already been affirmed in the most positive terms by the former Permanent Court of International Justice in the case of the *Treatment of Polish Nationals in Danzig*,<sup>5</sup> and in the *Greco-Bulgarian Communities* case.<sup>6</sup> In the article corresponding to the present one in the 1951-4 cycle, individual affirmations of the principle on the part of judges of the present Court, in particular Judges Alvarez and McNair were cited.<sup>7</sup> There was also a pronouncement of Judge Klaestad's belonging to the same period,<sup>8</sup> who in the

<sup>1</sup> See, for instances, the 1950 and 1953 articles—references as in n. 2, on p. 184. <sup>2</sup> *Ibid.*

<sup>3</sup> See the following sentence from the U.S. Secretary of State's observation on the *Cutting* case, U.S. Foreign Relations 1887, p. 751; Moore's *Digest* (1906), p. 235: '... if a government could set up its own municipal laws as the final test of its international rights and obligations, then the rules of international law would be but the shadow of a name and would afford no protection either to States or to individuals.'

<sup>4</sup> See Chapter V of publication cited in footnote 5 on p. 188.

<sup>5</sup> *P.C.I.J. Reports*, Series A/B, No. 44, p. 24. The Court said: 'It should ... be observed that ... according to general principles of law ... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent on it under international law or treaties in force ... it results that the question of the treatment of Polish nationals or other persons of Polish origin or speech must be settled exclusively on the bases of the rules of international law and the treaty provisions in force between Poland and Danzig.'

<sup>6</sup> *Ibid.*, Series B, No. 17, p. 32. The Court said: '... it is a generally accepted principle of international law that in relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty.'

<sup>7</sup> *This Year Book*, 30 (1953), pp. 53-54.

<sup>8</sup> Omitted by an oversight from the relevant article in the first cycle.

first phase of the *Nottebohm* case (jurisdiction) expressed the view (*I.C.J.*, 1953, p. 125) that

'With regard to the allegations of the Government of Guatemala that provisions of its national law prevent that Government and its officials from appearing before the Court, it suffices to say that such national provisions cannot be invoked against rules of international law.'

In the period now under review, the principle was again affirmed in more than one case by individual judges and also, though obliquely, by the Court as such. The Court's pronouncement can most conveniently be considered under the next subsection.<sup>1</sup> The first of those made on the part of individual judges in this period was by Sir Hersch Lauterpacht in the *Norwegian Loans* case, in a passage which, though primarily concerned with the issue of domestic jurisdiction<sup>2</sup> (as to which see § 3 below), contains an emphatic if implicit affirmation of the supremacy of international law in inter-State relations. This passage (*I.C.J.*, 1957, pp. 37-38) was as follows:

'It may be admitted, in order to simplify a problem which is not at all simple, that an "international" contract must be subject to some national law; this was the view of the Permanent Court of International Justice in the case of the Serbian and Brazilian Loans. However, this does not mean that that national law is a matter which is wholly outside the orbit of international law. National legislation—including currency legislation—may be contrary, in its intention or effects, to the international obligations of the State. *The question of conformity of national legislation with international law is a matter of international law. The notion that if a matter is governed by national law it is for that reason at the same time outside the sphere of international law is both novel and, if accepted, subversive of international law.* It is not enough for a State to bring a matter under the protective umbrella of its legislation, possibly of a predatory character, in order to shelter it effectively from any control by international law. There may be little difference between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract. For these reasons it is difficult to accept the argument of Norway to the effect that as this Court can decide only on the basis of international law and that as the main substantive question in the dispute is the interpretation of Norwegian law, this is not a dispute which is covered by Article 36 (2) of the Statute. The dispute now before the Court, although it is connected with the application of Norwegian law, is also a dispute involving international law. It is possible that if the Court had jurisdiction on the merits it would find that Norway has not violated any rule of international law by declining to repay the bonds in gold. However, in finding that, the Court would apply international law'—[italics added.]

In the *Guardianship of Infants* case also, several judges affirmed the principle of the primacy of international law over domestic law or domestic

<sup>1</sup> Dealing (see (2) on p. 189, below) with apparent exceptions to the principle.

<sup>2</sup> The Norwegian plea was that the main issue in the case turned on the interpretation of a contract between the Norwegian Government and foreign bondholders which was a Norwegian domestic contract and an internal matter. On the basis that the contract was governed by Norwegian domestic law, not international law, the Norwegian Government argued that it did not fall within the ambit of, or within any of the categories enumerated in, Article 36, paragraph 2 of the Court's Statute, according to which the Court must base its decisions on international law.



obligation (and hence automatically the similar primacy of any treaty obligation, since the principle *pacta sunt servanda* is itself a principle—or at any rate a postulate—of international law). Judge Cordova who, in fact, in the same context also affirmed the principle *pacta sunt servanda* (as to which see § 2 below), said (*I.C.J.* 1958, 140):

‘In my opinion there is no national law whatever its classification<sup>1</sup> might be, either common or public or with different aim and scope,<sup>1</sup> which in the face of a treaty dealing with the same subject-matter can juridically claim priority in its application.’

Similarly Judge Badawi (*ibid.*, p. 74) said that

‘... it has been established by many judicial decisions that a State cannot evade the obligations imposed by an international convention by invoking its own law, or indeed even its own constitution.’

Judge Lauterpacht equally, in a passage made in a context the nature of which is more fully explained elsewhere,<sup>2</sup> said (*ibid.*, p. 83):

‘A State is not entitled to cut down its treaty obligations in relation to one institution by enacting in the sphere of another institution<sup>3</sup> provisions whose effect is such as to frustrate the operation of a crucial aspect of the treaty.’

This passage brings out (even though such was not actually its primary object) not only that existing domestic law may not be pleaded in avoidance of subsequently assumed international obligations, but also that the same applies in respect of any domestic law enacted after the international obligation arose (e.g. by the conclusion or coming into force of a treaty). In the same case, Judge Sir Percy Spender brought out another aspect of the matter when he said (*ibid.*, pp. 125-6):

‘It seems unnecessary to argue that if a domestic law has been validly passed which, either expressly or by necessary implication, is made clearly to apply, in terms obligatory upon the judicial and administrative organs of that country, to all persons or things within the territorial limits of a sovereign and independent State, the mandatory nature of the law upon all persons, foreigners or nationals within the territorial limits of the State must, within its municipal system, be observed by those judicial and administrative organs. Indeed, assuming the constitutionality and validity of the Act within the domestic legal system of the State concerned, it is competent for a State party to any treaty or convention to pass a law binding on its *own* authorities to the effect that, notwithstanding anything in the treaty or convention, certain provisions thereof binding on that State shall not apply, or to legislate in terms clearly inconsistent with, and intending to override, the terms of an existing treaty (cf. *Sanchez v. United States*, U.S. Supreme Court, Reports, Vol. 216, at p. 167). Whether described as mandatory or otherwise, public or otherwise, that law would have full force and effect within the territorial limits of the State in question. But that in no way would be relevant to the

<sup>1</sup> For the significance of these terms and phrases see subsections 2(b) and (e) below.

<sup>2</sup> See *ibid.*

<sup>3</sup> The point was that the operation of a treaty on the guardianship of infants was said to be cut down by a law not on that topic as such, but on child welfare.

question whether that legislation—or an act done pursuant to it—is or is not in breach of or incompatible with obligations binding upon the State by virtue of a treaty or convention.’

Unnecessary confusion has indeed arisen over this whole question, due to the failure to realize that international and domestic law move in different spheres or fields, that each is supreme in its own sphere, but that this does not of itself involve any conflict between them, precisely because the spheres or fields are different.<sup>1</sup> In the domestic sphere, domestic law no doubt prevails, even if in ‘conflict’ with an international obligation (unless of course the domestic law itself provides—as it sometimes does—that in such a case the domestic law obligation is to give way);<sup>2</sup> but the supposed ‘conflict’ is immediately resolved and rendered non-existent because the domestic law obligation, while it may prevail in the domestic sphere, cannot override the international law obligation in the international sphere, in which international law prevails and national domestic law has no operation at all except in so far (the reverse of the coin) as international law itself enjoins or permits that it shall do so.<sup>3</sup> In short, although a State may be *domestically* prevented from carrying out an international obligation and may actually not carry it out for that reason, it can never thereby obtain international absolution; and it is precisely for the breach of the international obligation thus committed that, on the inter-State plane and whatever the circumstances, the State incurs international responsibility for which it must make appropriate reparation. It is the erroneous supposition that international and national law move in the same field or on the same plane that could alone have given rise to any controversy on the subject of the supremacy of international law in inter-State relations. The whole of the largely sterile-monist-dualist controversy has its root in this.<sup>4</sup> The present writer may perhaps be allowed to parallel Sir Percy Spender’s pronouncement with a passage taken from a course of lectures given at the Hague Academy of International Law in 1957:<sup>5</sup>

‘International and domestic law having no common field, there is no need, nor would there be any point in discussing whether their relationship is one of co-ordination, or of subordination one to another, or of mutual subordination to a common superior order. There is no more point in discussing the abstract question of supremacy in regard to these two legal orders than, as has been seen, there would be in discussing whether abstract supremacy lay with English or French law. Such a question is necessarily meaningless. Each is supreme in its own field, and all that matters for this purpose

<sup>1</sup> The author maintains that this is *not* a dualist view for the reasons given by him in Chapter V, part (1) of the publication cited in footnote 5 below.

<sup>2</sup> But, of course, precisely in doing that it is still the domestic law which, domestically, governs.

<sup>3</sup> Similarly, though vice versa, it is still international law which, in doing this, governs internationally.

<sup>4</sup> See pp. 71–74 of the author’s publication cited in footnote 5 below.

<sup>5</sup> *Recueil des Cours*, 92 (1957), II.

is that international law is supreme in the international field. The very question of supremacy as between the two orders, national and international, is irrelevant, as is also that of the existence of some superior norm or order conferring supremacy. National law is not and cannot be a rival to international law in the international field, or it would cease to be national and become international, which, *ex hypothesi*, it is not. National law, *by definition*, cannot govern the action of, or relations with, other States. It may govern or fetter the action of its own State in such a way that the latter cannot fulfil its international obligations, but again, by definition only at the national level and without legal effect or operation beyond it. Formally, therefore, international and domestic law as *systems* can never come into conflict. What may occur is something strictly different, namely a conflict of *obligations*, or an inability for the State *on the domestic plane* to act in the manner required by international law. The supremacy of international law in the international field does not in these circumstances entail that the judge in the municipal courts of the State must override local law and apply international law. Whether he does or can do this depends on the local law itself, and on what legislative or administrative steps can be or are taken to deal with the matter. The supremacy of international law in the international field simply means that if nothing can be or is done, the State will, on the international plane, have committed a breach of its international law obligations, for which it will be internationally responsible, and in respect of which it cannot plead the condition of its domestic law by way of absolution. International law does not therefore in any way purport to govern the content of national law in the national field—nor does it need to. It simply says—and this is all it needs to say—that certain things are not valid according to international law, and that if a State in the application of its domestic law acts contrary to international law in these respects, it will commit a breach of its international obligations.’

Sir Percy concluded by a general affirmation of the principle in its application to treaties and conventions (*ibid.*, pp. 128-9):

‘Public policy’ is principally or primarily a concept of municipal law. When, however, an international obligation is involved upon which this Court is called upon to pronounce, as in the present case, we are in a different field altogether. Treaty and convention obligations, whatever they are, must be faithfully observed. The provisions of municipal law cannot prevail over those of a treaty or convention (Greco-Bulgarian Communities, P.C.I.J., Series B, No. 7, p. 32).’

## (2) *Apparent exceptions to the supremacy principle*<sup>2</sup>

There are of course no real exceptions to this principle which, in the international field, is absolute. But apparent exceptions, in which international law (or a treaty) seems to give way to domestic law arise in several classes of cases, namely: where international law itself, or a principle of

<sup>1</sup> With regard to what Sir Percy Spender was here referring to, see further subsection (b) below.

<sup>2</sup> The use of this term is convenient. But it must be remembered that, as stated in subsection (1) above, it is only in the international field that international law is supreme—or, if also supreme in any individual domestic field, is so by virtue of the relevant provisions of domestic law. The point is that supremacy in the international field is necessarily sufficient, since it involves that, irrespective of the domestic law situation, in inter-State relations the international obligation must be carried out; or due reparation for its breach must be afforded.



treaty law, provides that domestic law shall govern the case; where a treaty on its correct interpretation permits this in certain specific instances; where an international obligation can only be carried out through or by the application of a provision of local law; or where the conflict itself is apparent and not real, and the application of the domestic law does not really involve a breach of any general international law rule, or of a treaty or other form of international agreement. The following are illustrations of cases falling within certain of these classes:

(a) *Domestic law governs by virtue of international law.* In a sense the whole domestic jurisdiction rule is an illustration of this. The essential feature of a case of domestic jurisdiction (assuming that the matter really is one of domestic jurisdiction)<sup>1</sup> is that the case is governed exclusively (or exclusively as to certain of its aspects) by the relevant provisions of the appropriate system of domestic law. But it is international law which determines both what matters come under the head of domestic jurisdiction, and also that when they do come under that head according to the rules applied by international law for the determination of that matter, they are then governed by substantive rules of domestic, not international, law. Thus the adjectival aspects of the matter are always governed by international law, and it is international law which, on the international plane, determines both what is domestic jurisdiction and what are the consequences of an affirmative determination in that sense. This position was implicit in the International Court's rejection of the United States' preliminary objection to the jurisdiction No. 4 (b) in the *Interhandel* case (jurisdiction). The formulation of this rejection will, however, more appropriately be considered in § 3 below in connexion with the general topic of domestic jurisdiction.

(b) *A general principle of treaty law may subordinate the operation of a treaty to rules of internal law in certain cases.* An illustration of this is afforded by the *Guardianship of Infants* case. Although the Court itself based its decision on another ground, several of the individual judges reached their conclusions by taking the view that in the case of treaties or conventions dealing with private international law or conflict of law topics, a recognized principle of treaty law imports the *exceptio ordinis publici*, i.e. permits the non-application of the treaty (in a case where its application would otherwise be called for) if such application would in the circumstances be contrary to the rules and principles of *ordre public*, as locally applied. This is a matter which *as such* will best be considered in connexion with the topic of treaty interpretation and application which will form a later article in the present cycle for the period 1954-9; but the following

<sup>1</sup> It is unnecessary for present purposes to consider the refinements involved by the use of such phrases as 'exclusively' or 'essentially' of domestic jurisdiction. But see § 3 (1) (d) below.

quotation from the separate opinion of Judge Lauterpacht, who together with Judges Badawi and Moreno Quintana took the lead in the application of this exception, will serve to indicate its character and legal basis (*I.C.J.*, 1958, pp. 91-92):

'Does the conception of *ordre public* operate . . . in the present case? This is the central issue before the Court. It can be examined here only in brief outline:

'In the first instance, the Convention now before the Court is a Convention of public international law in the sphere of what is generally described as private international law. This means: (a) that it must be interpreted like any other treaty, in the light of the principles governing the interpretation of treaties in the field of public international law; (b) that that interpretation must take into account the special conditions and circumstances of the subject-matter of the treaty, which in the present case is a treaty in the sphere of private international law.

'Secondly, in the sphere of private international law the exception of *ordre public*, of public policy, as a reason for the exclusion of foreign law in a particular case is generally—or, rather, universally—recognized. It is recognized in various forms, with various degrees of emphasis, and, occasionally, with substantial differences in the manner of its application. . . . On the whole, the result is the same in most countries—so much so that the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law. If that is so, then it may not improperly be considered to be a general principle of law in the sense of Article 38 of the Statute of the Court. . . .

'For these reasons the correct interpretation of a convention on private international law must take that general recognition of public order fully into account.'

(c) *The case of Conventions specifying that, in the relations between the parties, certain matters are to be governed by their respective domestic laws.* Consular conventions afford an illustration of this. Thus Article 25 of the Anglo-Italian Consular Convention of June 1st, 1954, reads as follows:<sup>1</sup>

'Money or other property may be paid, delivered or transferred to a consular officer pursuant to the provisions of Articles 23 and 24 only to the extent that, and subject to the conditions under which, payment, delivery or transfer to the person whom the consular officer represents or on whose behalf he receives the money or property would be permitted under the laws and regulations of the receiving State. The consular officer shall acquire no greater rights in respect of any such money or other property than the person whom he represents or on whose behalf he receives the money or property would have acquired, if the money or property had been paid, delivered or transferred to such person directly.'

(d) *Cases in which it is precisely the object of the treaty to produce certain results under the internal law of one or more of the parties, or to cause domestic law rights to operate in lieu of international law rights.* This is not simply a matter of the application of the well-known general rule that a State having

<sup>1</sup> U.K. Government Publications, H.M. Stationery Office, Cmd. 9193 of 1954, p. 14. See also the corresponding Article 24 of the Anglo-Swedish Consular Convention of March 14th, 1952, published in the *United Nations Handbook on the Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (ST/LEG/SER.B/7, p. 467); and see the second part of the same publication generally (pp. 417 et seq.) for other examples.

entered into a treaty obligation must bring its internal law into conformity with the treaty so that it can carry it out. That would not be an exception, even apparent, to the principle of the supremacy of international over domestic law—but a part of that principle, and indeed one of its most important aspects. But a treaty may specify, for instance, that foreigners or certain classes of foreigners are, either generally, or in relation to certain categories of matters, to receive national treatment, when no principle of international law would entitle them to this. Treaties of commerce and establishment frequently do so. It may then be said that, the domestic law having duly been brought into conformity with the treaty, it governs in the sense of affording treatment that general international law would not, of itself, require to be granted. This ‘exception’ to the principle of the supremacy of international law must, however, be pronounced to be doubly ‘apparent’ and not real; for not only is it precisely the treaty—i.e. an international law transaction—that creates this situation—but the very supremacy principle itself operates only in cases where the nature of the conflict with domestic law is such that, if the domestic law should govern the matter, *inferior* treatment will result for the State or other *persona* claiming international law or treaty rights or benefits. Such a situation cannot exist where the application of the domestic law, however brought about, results in treatment actually superior to that required under general international law. There are, however, cases (such as those which occurred before the former Permanent Court in the *Memel Statute* case,<sup>1</sup> and the *Jurisdiction of the Danzig Courts* case)<sup>2</sup> where the fact that a treaty is mainly concerned to create rights or set up a certain position under the domestic law of one or more of the parties will involve that in the event of a dispute, an international tribunal will have to inquire into and so to speak ‘apply’ domestic rather than international law—though of course it applies international law in the very fact of applying the treaty. It was the existence of an analogous situation, though in a slightly different context, that underlay Judge Lauterpacht’s dictum, above cited,<sup>3</sup> in the *Norwegian Loans* case, that it was ‘difficult to accept the argument of Norway to the effect that as this Court can decide only on the basis of international law and that as the main substantive question in the dispute is the interpretation of Norwegian law, this is not a dispute which is covered by Article 36 (2) of the Statute’.

(e) *Absence of any true conflict*<sup>4</sup> *between the international and domestic law situations.* In the *Guardianship of Infants* case, the International Court in effect affirmed the principle of the supremacy of international law while at the same time denying that there was any occasion for applying this prin-

<sup>1</sup> Series A/B, No. 49.

<sup>2</sup> Series B, No. 15.

<sup>3</sup> See § 1 (1), on p. 186 above.

<sup>4</sup> Again (see p. 189, n. 2 above) the use of a particular term here is based on considerations of convenience. Reasons have already been given in § 1 (1) above for maintaining that there is no real conflict in the proper sense.



ciple in that particular case. The issue very briefly stated (it will be more fully considered in a later article on treaty questions arising in the 1954-9 period) was whether action by the Swedish authorities, apparently—or on the face of it—contrary to the provisions or intention of a Swedish-Netherlands Convention on the Guardianship of Infants, could be regarded as justified and not in breach of the Convention because it was taken in the application of a Swedish law relating not to the subject of the guardianship of infants as such, but to the separate, even if in some respects related, subject of child welfare and the protection of children. This action had the practical consequence that guardianship arrangements that would otherwise have required to be recognized under the Convention were not given effect to; but the Swedish argument was that as this was done not as a matter of guardianship, or in determining any question of guardianship, but as a matter of, and in relation to an issue of child welfare, there was no breach of the Convention which, according to the Swedish view, only dealt with guardianship as such, and did not preclude action taken on a child welfare basis. More particularly, the Convention provided for the application of Dutch guardianship law and arrangements to any minor of Dutch nationality resident in Sweden, and a provision of the Convention stated that ‘the administration of a guardianship extends to the person . . . of the infant’; whereas the effect of the application of the Swedish law on ‘protective upbringing’ was to deprive the guardian appointed by the Dutch courts of the full custody of the minor. The Swedish authorities, however, claimed that as there was no denial or rejection of the status *as guardian* of the person appointed by the Dutch courts, or of her general right to concern herself with the person of the infant, no violation of the Convention was involved: the application of Swedish child welfare law to the case placed certain limitations on the *exercise* of full normal guardianship rights, but did not oust that guardianship as such, or prevent its exercise in every other respect. To illustrate the point by an analogy, it was as if the Swedish authorities had claimed that just as the Convention could not (merely on guardianship grounds) have prevented the application (on welfare grounds) of a general medical law requiring the infant in certain circumstances to spend a period of quarantine in hospital, whether the guardian approved of this or not—so equally it could not prevent the application on welfare or protective upbringing grounds of a law giving the physical custody of the child to someone other than the legal guardian. The Dutch contention was (*inter alia*) that since physical custody—or at any rate the right to exercise it—is of the essence of guardianship of the person of an infant, the application of the Swedish child welfare law in effect nullified such guardianship and resulted in the non-implementation of the Convention. The Court acceded to the Swedish

view; but, for present purposes, it is unnecessary to consider the merits of that view. This will be done in the later article above referred to. In the present context, the important point is that the Court began by indirectly affirming the supremacy principle, saying (*I.C.J.*, 1958, p. 67):

'The Court is not confronted by a situation in which it would suffice for it to say that a national law cannot override . . . obligations assumed by treaty.'

It continued (*ibid.*):

'It is asked to say whether the measure taken and impugned is or is not compatible with the obligations binding upon Sweden by virtue of the 1902 Convention. To do that, it must determine what are the obligations imposed by that Convention, how far they extend and, especially, it must determine whether, by stipulating that the guardianship of an infant is governed by the national law of the infant, the 1902 Convention intended to prohibit the application to a foreign infant of a law such as the Swedish Law on the protection of children.'

Then, after examining the Convention and the relevant Swedish legislation, the Court concluded (*ibid.*, p. 71):

'It thus seems to the Court that, in spite of their points of contact and in spite, indeed, of the encroachments revealed in practice, the 1902 Convention on the guardianship of infants does not include within its scope the matter of the protection of children and of young persons as understood by the Swedish Law of June 6th, 1924. The 1902 Convention cannot therefore have given rise to obligations binding upon the signatory States in a field outside the matter with which it was concerned, and accordingly the Court does not in the present case find any failure to observe that Convention on the part of Sweden.'

This, it will be seen, amounted to a finding that while the application of the national Swedish law would have had to give way, had it been in conflict with the Convention, there was in fact no conflict because the relevant Swedish legislation in pursuance of which the impugned Swedish measures had been taken lay in a field with which the Convention did not deal, and in respect of which it did not fetter Swedish freedom of action. As previously mentioned, it is unnecessary to examine the merits of this view now. The case has been considered here because it shows the Court as in effect recognizing the supremacy principle, and also illustrates very forcibly one of the apparent exceptions to the principle—although, of course, it is of the essence of the matter that the exception *is* only apparent and not real. The position in this type of case simply is that, there being no conflict (or at any rate a judicial tribunal having so found) no occasion for the application of the supremacy principle exists.

#### , § 2. *PACTA SUNT SERVANDA*

In the *Guardianship of Infants* case, Judge Córdova affirmed in general terms the principle *pacta sunt servanda*. Referring to the *exceptio ordinis*

*publici* considered in § 1 (2) (b) above, the application of which to the case he (dissenting from certain of his colleagues—*vide supra*) rejected, Judge Córdova (*I.C.J.*, 1958, p. 141) said:

'I do not believe that there is such a principle of Public International Law—the only law between nations;<sup>1</sup> on the contrary, I have always known the time-honoured and basic principle of *pacta sunt servanda*, which makes it impossible for the States to be released by their own unilateral decision from their obligations according to a treaty which they have signed.'<sup>2</sup>

Although Judge Córdova was here applying the principle *pacta sunt servanda* to treaty obligations, i.e. to obligations arising under that particular type of *pactum* constituted by a treaty, he was clearly referring to it as a principle of general international law applicable to general international law obligations as well. In addition to the particular case of treaties as such, general (i.e. customary) international law is equally said to be founded on, and to derive its obligatory force from, consent—that is from the consent of States evinced by their established practices and conduct (the *pratique constante*). Consent may indeed in this sense be the foundation of the rules of customary international law. But the obligation to conform to these rules requires something more, namely the existence of a principle to the effect that the giving of consent, whether express or implied, creates obligation. This principle is the principle *pacta sunt servanda*. But strictly this is not a rule or principle of international law. It is, for international law, a postulate lying outside the actual field of international law. The system of international law cannot be clothed with force by a principle that is part of the system itself; for unless the system already had force that principle itself would have no validity, and there would be a *circulus inextricabilis* or *viciosus*. A principle exterior to the system must be sought. Such a principle is the rule *pacta sunt servanda*; and if the principle is to do what is required of it, it must, in relation to international law, be regarded not as a principle but as a *postulate*—an assumption that has to be made before the system can work or have any meaning. In this sense, the principle *pacta servanda* becomes the postulate on which the whole system is founded, and becomes the theoretical foundation of international law and its binding force. But although the *pacta servanda* principle stands in relation to international law

<sup>1</sup> Meaning that the *ordre public* exception is a principle of private international law, and that private international (or conflicts) law was not law between nations. This is true in the sense that there is no general *corpus* of private international or conflicts rules, each country applying its own rules in that respect, although there is a considerable similarity between these various bodies of law. But there are many points at which public and private international law meet and many important rules common to both (cf. Wortley, 'The Interaction of Public and Private International Law Today'—*Recueil des Cours* (1954)); and it can definitely be regarded as a requirement of public international law that States should possess and should apply appropriate conflict rules in cases having a foreign element—see the present writer's 'The General Principles of International Law' in the *Recueil des Cours* (1957), Chapter XII, Sections 119-22.

<sup>2</sup> That is to say, to which they have become parties by whatever was the relevant method.



as a postulate outside the system, this does not mean that it stands outside *law* altogether. It is a principle of natural law in the nature of *jus cogens*;<sup>1</sup> and it is as a principle of natural law that it can act as a postulate of international law, giving the latter system an *objective* validity—i.e. a validity not dependent on the consent of the entities subject to the system.<sup>2</sup> It is true that postulates being, *ex hypothesi*, assumptions, and therefore unverifiable except by appeal to an outside frame of reference, may be objectively incorrect—using the term ‘objectively’ as denoting whatever would result from a reference to such an outside framework; but that nevertheless a system founded on an incorrect postulate may itself be valid in the sense of being self-consistent on the basis of the assumptions made.<sup>3</sup> However, the international lawyer cannot be content with international law as a merely self-consistent system. He seeks grounds for ascribing to it an absolute and objective validity. These grounds can only be said to exist if the basic postulate on which the system is founded can itself be regarded as having such validity.<sup>4</sup> But for the reasons already given, any such postulate, if valid, must derive its validity not from international law itself but from a superior system. This can only be natural law, the substratum informing all valid systems of law. Or, to put it differently, the existence of natural law and its validity must itself be postulated if international law is to possess validity. It is thus not necessary in practice—though as a matter of philosophical, or perhaps metaphysical inquiry the point arises—to ask or seek to answer objectively the question whence natural law in its turn derives its validity.<sup>5</sup> But this far at least the matter needs to be traced, if the real part played by the principle *pacta sunt servanda* in relation to international law, and if the reasons why, and the mechanism by which it plays this part, are properly to be understood.

<sup>1</sup> See the author's article ‘Some Problems Regarding the Formal Sources of Law’ in *Symbolae Verzijl* (Martinus Nijhoff, 1958), Sections IV and V, pp. 161–8.

<sup>2</sup> *Particular rules* may of course, and do, *enter* the system by way of the consent, express or to be implied, given by such entities. What is not and cannot be dependent on such consent is the ultimate principle that consent, once given, creates a continuing legal obligation.

<sup>3</sup> Self-consistent mathematical systems have been erected on the basis of apparently unnatural postulates, some of which have subsequently turned out to correspond to the non-Euclidean conditions of the Einstein space-time world.

<sup>4</sup> That the law has been enacted, or otherwise brought into being by the prescribed methods (whatever these may be at different times and in different countries), is no doubt normally sufficient in itself to give it full force. But this is so only if an antecedent rule is postulated according to which enactment by that method confers legal force on what is enacted. The question will then arise, what gives this antecedent rule itself its authority? The constitution?—but then who made the constitution and on what authority? In logic and theory, the process can obviously never end, except on the basis of a postulate which must lie outside the legal field altogether (for if within it, it would itself require legal justification, and the process would merely have to be repeated).

<sup>5</sup> In an article entitled ‘The Foundations of the Authority of International Law’ published in the *Modern Law Review* for January, 1956, p. 1, the present writer suggested that such an inquiry can serve little useful purpose. In the nature of the case it can never be finalized.

§ 3. DOMESTIC JURISDICTION<sup>1</sup>

(1) *The substantive aspect: what matters are matters of domestic jurisdiction*

(a) *The question is itself governed by international law.* It follows inevitably from the principle of the supremacy of international law over domestic law in the international field (see §§ 1 and 2 above) that the question what matters are matters of domestic jurisdiction, or *whether* any particular matter falls within this category is itself a question of, and to be determined by, international law. This, as part of the supremacy principle, has already been considered in § 1 (2) (a) above. At first sight this may seem paradoxical: surely it must be domestic law which determines what is of its own jurisdiction. For domestic purposes, yes; but not in the international field—not for the purposes of inter-state relations. The point is a very good illustration of the unreal nature of the supposed conflict between the domestic and the international legal fields referred to in § 1(1) above, and hence, as there suggested, of much of the monist-dualist controversy.

(b) *The international law criteria for determining the question of domestic jurisdiction.* The earlier views of the Court on this subject were considered in the article in this *Year Book*, 29 (1952), pp. 34-37. On the basis of those views, it was there suggested that the issue of domestic jurisdiction, whether it is raised for jurisdictional or substantive purposes (and as to this see subsection (2) below), turns simply on whether the matters involved are or are not the subject of international *obligations*, whether arising under a treaty or other international agreement, or under a rule of general customary international law. Thus, matters of domestic jurisdiction might be said to comprise all those matters (but only those) which are not the subject of some international obligation. In the period now under consideration, the Court and a number of individual judges appear to have based themselves more specifically on the criterion adopted by the former Permanent Court in the *locus classicus* of the subject, as it has been called<sup>2</sup> (the *Tunis and Morocco Nationality Decrees* case),<sup>3</sup> namely, whether the matter is or is not one 'regulated by international law'. If, under this phrase, there can be considered as subsumed the criterion 'regulated by treaty', there would not appear to be any substantial difference between this test and that of being the subject of international obligation. Sir Hersch Lauterpacht, in an article written many years before he was elected to the present Court,<sup>4</sup> suggested

<sup>1</sup> The reason why this topic is dealt with in the present article instead of in the later article on jurisdictional questions arising during the 1954-9 period is that the subject of domestic jurisdiction is so fundamental to the whole operation of international law that it must be considered under the head of 'General Principles'.

<sup>2</sup> See—and generally on this subject—Professor Waldock's 'The Plea of Domestic Jurisdiction before International Legal Tribunals' in this *Year Book*, 31 (1954), pp. 96-142.

<sup>3</sup> *P.C.I.J. Reports* (1923), Series B, No. 4.

<sup>4</sup> In *Economica*, 10 (1930), p. 137.

yet another criterion or method of expressing the same idea, namely 'whether in the particular case there exists a concrete rule of international law [*sc.* 'or treaty provision'] limiting the State's freedom of action'. Again, while putting it somewhat less generally,<sup>1</sup> this criterion seems to lead to a similar practical result.

(c) *Common and governing feature of the above-mentioned criteria.* The basic idea underlying all these criteria, though differently expressed, and though in specific cases they could lead to certain differences of application, is the same; and it is the failure adequately to perceive it that has given rise to so much of the controversy on the subject in bodies such as the United Nations. This is, that the criterion is not the intrinsic character of the subject-matter itself (as being, or not being, domestic or international in its nature), but the extrinsic one of its regulation (or not) by international law or treaty.<sup>2</sup> This operates both ways. Matters (such as, for instance, the nature of a State's laws relating to the administration of justice in its territory) which are *intrinsically* of domestic jurisdiction cease to be so in so far as they are regulated by international law or treaty.<sup>3</sup> Conversely, the fact that certain matters may be of international *concern*, or even produce effects beyond a country's borders (e.g. its economic, fiscal, racial or immigration policies), does not of itself cause them to cease to be matters of domestic jurisdiction, if they are not regulated by international law or treaty, and are not the subject of any positive international law or treaty obligation.<sup>4</sup>

(d) *The use of the terms 'exclusively', 'essentially', &c.* The same point of view as to what does and does not constitute domestic jurisdiction for international purposes (i.e. based on this type of criterion) goes far to render sterile any fine distinctions drawn between such terms as 'exclusively' or 'solely', and 'essentially' of domestic jurisdiction, in treaties or other instruments dealing with the matter; for clearly nothing that is regulated by international law or treaty can be 'exclusively' or 'solely' of domestic juris-

<sup>1</sup> '... regulating State action' would perhaps be a better phrase.

<sup>2</sup> Of course where the international law elements involved depend exclusively on the existence of a treaty governing the latter, it is only as between the parties to the treaty that it will cease to be one of domestic jurisdiction.

<sup>3</sup> The fact that, as mentioned in the immediately preceding footnote, the existence of a treaty governing the matter does not remove the matter *generally* from the sphere of domestic jurisdiction, but only as between the parties to the particular treaty, serves further to emphasize that it is not the intrinsic character of the subject-matter concerned that is determinant—for otherwise its non-domestic character (if such it has) would operate *erga omnes*.

<sup>4</sup> It is neglect of these principles, i.e. the tendency to look to the intrinsic character of a subject, or its degree of international 'concern', instead of to its regulation (or not) by international law that has caused so much of the controversy in the United Nations Assembly about the correct effect of Article 2 (7) of the Charter. It may be useful in this connexion to recall the language of the Permanent Court in the *Nationality Decrees* case (*P.C.I.J. Reports*, see above, p. 197, n. 3, at pp. 23-24) to the effect that (speaking of Article 15 (8) of the League Covenant): 'The words "Solely within the domestic jurisdiction" seem . . . to contemplate certain matters which, *though they may very closely concern the interests of more than one State*, are not in principle regulated by international law. As regards such matters, each State is sole judge'—(italics added).



diction; while, as has been seen, the fact that some matter is essentially (in the sense of intrinsically) one of domestic jurisdiction does not prevent it being internationally regulated, and therefore from being in the position of not being by international law a matter of domestic jurisdiction. These ideas would appear to be reflected in the following passage from Sir Hersch Lauterpacht's separate opinion in the *Norwegian Loans* case, even though, as the context shows, this passage had as its immediate object a slightly different point<sup>1</sup> (*I.C.J.*, 1957, pp. 51-52):

'... in the first instance, it will be noted that the French reservation in issue refers not to matters which are according to international law exclusively within the domestic jurisdiction of the State, but to matters which are essentially within the domestic jurisdiction. There are matters which have often been considered as being essentially within the domestic jurisdiction of States but which, having become regulated by treaty or custom, have ceased to be so—an aspect of the question for which the Advisory Opinion of the Permanent Court of International Justice in the case of *Tunis and Morocco Nationality Decrees* provides an instructive and authoritative illustration. Tariffs, immigration, treatment of aliens and citizens in national territory, internal legislation generally—all those matters have been claimed to be essentially within the domestic jurisdiction of the State—though, as stated, they have often been described as being matters of domestic jurisdiction or essentially of domestic jurisdiction. Practically every aspect of the conduct of the State may be, *prima facie*, within that category for the reason that normally the State exercises its activity within its national territory, or, on the high seas, in relation to its ships which for some purposes are considered by States to form part of its territory. . . . Most Judgements given by this Court and its predecessor—with the exception of those concerned with territorial disputes—have been given in relation to matters bearing on the activity of the State within its jurisdiction and related to its national legislation and administration. These are the typical occasions giving rise to State responsibility.'

From this passage it might appear as if, in Sir Hersch Lauterpacht's view,

<sup>1</sup> These observations were really made in connexion with the question of the so-called 'automatic reservation' to acceptances of the Court's compulsory jurisdiction under the 'Optional Clause' of Article 36 of the Statute. Sir Hersch Lauterpacht's object was to show that because of the extremely wide field of matters that could plausibly be represented as coming—at any rate in their basic nature—within the domestic jurisdiction sphere, automatic reservations in such forms as 'disputes relating to matters which fall within the domestic jurisdiction of X as determined by the Government of X' allow the State concerned to exclude virtually any dispute without laying itself open to charges of obvious bad faith. Is this really so? If the view suggested above is correct, namely that the issue of domestic jurisdiction depends not on the intrinsic character of the matter involved, but on whether it was or was not regulated by international law or by an applicable treaty, then a State which used the automatic reservation to exclude a dispute that quite clearly raised international law or treaty issues—while not necessarily guilty of bad faith as such—would be proceeding on the basis of an erroneous concept of domestic jurisdiction, and one that ran counter to all the relevant decisions of the present and former International Courts. Whether this could constitute a ground on which the Court could refuse to accept the 'determination' of the country concerned, excluding the dispute, is a large question that must be reserved for discussion in a later article covering the purely jurisdictional issues arising in the 1954-9 period. There is of course also the separate question of the whole validity of the automatic type of reservation, as to which the Court as such has never yet made any pronouncement, although several judges have done so individually in the *Norwegian Loans* and *Interhandel* cases. This question also will be discussed in a later article.

few things remain which could be said to be, in the sense already discussed, matters of domestic jurisdiction. But even if so intended, that view would not be in any way inconsistent with the classic dictum of the Permanent Court in the *Tunis and Morocco Nationality Decrees* case, according to which the question of domestic jurisdiction (or not) is 'an essentially relative question' depending on 'the development of . . . international law at the time'.<sup>1</sup>

(2) *The jurisdictional aspect: on what basis must a plea of domestic jurisdiction be examined as a bar in limine on grounds of lack of competence?*

(a) *Nature of the jurisdictional aspect.* Although in theory the plea of domestic jurisdiction can be put forward as a substantive defence on the merits—i.e. that the matter not being regulated by international law or treaty, there cannot *ex hypothesi* have been any breach of an international obligation—it is, wherever possible,<sup>2</sup> usually put forward as a plea to the jurisdiction of the tribunal concerned, in order to raise a bar *in limine* to any consideration of the merits of the case. However, even where a preliminary objection, whether based on domestic jurisdiction or on something else, succeeds as a plea to the jurisdiction in the sense that the tribunal (eventually) declares itself to be incompetent, and gives no decision on the merits, the objection does not always avoid a consideration of the merits; for in cases where there is close connexion between the issue of jurisdiction and that of merits (e.g. both involve approximately the same facts and/or issues of law) it may be impossible to go into and pronounce upon the one without prejudice to the other, and vice-versa. In such cases the tribunal will direct the jurisdictional issue to be joined to that of the merits.<sup>3</sup> But by no means all pleas to the jurisdiction are of this kind. For instance, in the period now under consideration, the *Indian Land Passage* (jurisdiction) case<sup>4</sup> involved a number of preliminary issues of jurisdiction which, with one exception, were totally distinct from and raised no point relating to the merits, and which the Court accordingly dealt with as preliminary issues. The exception was precisely an objection based on the plea of domestic jurisdiction which the Court joined to the merits; and the feature of the domestic jurisdiction plea is that, by its very nature it almost, if not actually, always

<sup>1</sup> As to this, see this *Year Book*, 29 (1952), p. 36.

<sup>2</sup> The plea of domestic jurisdiction can only be put forward as an issue of pure competence (i.e. as excluding the jurisdiction of the tribunal entirely) on the basis of some *instrument* conferring jurisdiction on the tribunal, or material on the question of its jurisdiction, containing a provision which enables the competence of the Court to be challenged on domestic jurisdiction grounds (see Waldock, *loc. cit.* [on p. 197, above, n. 2], p. 99, paragraph 6, and p. 140, Conclusion (3)). In the absence of any such instrument or provision the plea of domestic jurisdiction could only be put forward as a substantive defence, though it might perhaps be raised—or taken—as a sort of preliminary point.

<sup>3</sup> See the author's article in this *Year Book*, 34 (1958), subsection (c) on pp. 24–25.

<sup>4</sup> In its jurisdictional phase—I.C.J., 1957, p. 125.

will be closely bound up with the merits. But it is obvious that if, for this reason, the jurisdictional aspect of the domestic jurisdiction issue were in fact almost invariably to be joined to the merits, it would lose much of its point, considered as an objection to the jurisdiction or plea in bar.<sup>1</sup> Nevertheless, in at least one case<sup>2</sup> the permanent Court did effect such a joinder, and as has been seen, the present Court did so in the *Indian Land Passage* case. A solution to this problem was propounded in the *Tunis and Morocco Nationality Decrees* case, which saw the adoption of what has been called the 'provisional view' theory,<sup>3</sup> and this theory has also been applied by the present Court and supported by judges delivering individual opinions. The effect of its application is to enable the plea of domestic jurisdiction to be dealt with as a true preliminary issue, but in such a way that should the Court not accede to it, the defence on the merits is not foreclosed or prejudiced. The 'provisional' theory involves certain dangers and ambiguities which will be considered later. Its basis must first be discussed.

(b) *Basis of the 'provisional' theory: it is insufficient either simply to allege or deny the existence of international law or treaty elements.* In the *Nationality Decrees* case, the Permanent Court made it clear that it did not suffice in order to defeat the plea of domestic jurisdiction merely to go through the motions of bringing the matter before an international organization (or, *semble*, before the Court itself), or merely to invoke allegedly applicable rules of international law or treaty engagements.<sup>4</sup> In the period now under review Judge Badawi applied a variant, or special application of this principle in the *Norwegian Loans* case, as follows (*I.C.J.*, 1957, p. 32):

'It was asserted, however, that the case falls within the domain of international law because the French Government has adopted the cause of its nationals and is exercising diplomatic protection on their behalf, thereby conferring an international character<sup>5</sup> on the case. It is hardly necessary to point out that this begs the question, since the contention put forward in this Objection [i.e. that the matter was exclusively one of Norwegian municipal law] is, in fact that there were no grounds for the exercise of [i.e. no right to exercise] this protection.'

<sup>1</sup> It would not necessarily lose *all* point, for even joined to the merits it should theoretically eliminate consideration of any issues of merits not directly connected with the domestic jurisdiction question.

<sup>2</sup> The *Losinger* case (1936), Series A/B, No. 67; and see generally as to this and the attitude of the Permanent Court, Waldock, loc. cit. [on p. 197, above, n. 2], pp. 116-21.

<sup>3</sup> Waldock, loc. cit., pp. 108 and 111-14.

<sup>4</sup> Similarly, in the *Ambatielos* case (2nd phase) the Court in effect held that for the purpose of establishing that a claim was based on a certain Treaty, it did not suffice for the plaintiff Government merely to invoke the Treaty or 'to establish a remote connection between the facts of the claim and the Treaty . . .' (although in the result this was in practice what the Court eventually allowed the plaintiff Government to do—see subsection (ii) below, and the author's article in this *Year Book*, 34 (1958), pp. 46-54).

<sup>5</sup> The term 'international character' is not the happiest one in dealing with questions of domestic jurisdiction. It lends itself to the interpretation that matters of international concern (whether or not regulated by international law or treaty) are not matters of domestic jurisdiction, which—if they are *not* so regulated—is not the case—see above, subsection (1) (c) and n. 4 on p. 198; and below, citation from the *Nationality Decrees* case at the end of the present subsection.



Similarly, 'international character' could not be attributed to any matter merely because the question of such attributability was in issue (*ibid.*, p. 33):

'... it would be very strange, and even paradoxical, to consider that the denial of the international character of a question of municipal law and the discussion entered into in that connection confer on that very question an international character.'

*Corollary.* If the plea of domestic jurisdiction cannot be defeated by merely invoking allegedly applicable rules of international law, or treaty provisions, it must be the counterpart of this position that a mere denial of the existence or applicability of any such rules or provisions will not suffice to establish a plea of domestic jurisdiction, if, on a provisional examination, the matters in dispute appear *prima facie* to involve or raise issues of an international legal character—i.e. of international law or treaty. This was in effect what the Permanent Court found in enunciating its 'provisional' theory in the *Nationality Decrees* case. After making the point about it not being sufficient merely to invoke international law or treaty, the Court (in a passage which, as given below, has been slightly emended in order to bring out the precise issue) went on to say that on the other hand a matter would be deemed to be one of international and not merely domestic jurisdiction<sup>1</sup>

'when once it appears that the legal [i.e. international law] grounds (*titres*) relied on are such as to justify the provisional conclusion that they are of juridical importance for the dispute submitted to the Council, and that the question whether it is competent for one State to take certain measures is subordinated to the formation of an opinion with regard to the validity and construction of these [international] legal grounds (*titres*).'

(c) *The present Court and the 'provisional' principle.* Modelling itself on the above quoted dictum of the Permanent Court, and giving it perhaps clearer expression, the Court in the *Interhandel* case (jurisdiction) said (*I.C.J.*, 1959, p. 24) that it would

'... base itself on the course followed by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees issued in Tunis and Morocco* (Series B, No. 4), when dealing with a similar divergence of view. Accordingly, the Court does not, at the present stage of the proceedings, intend to assess the validity of the grounds invoked by the Swiss Government or to give an opinion on their interpretation, since that would be to enter upon the merits of the dispute. The Court will confine itself to considering whether the grounds invoked by the Swiss Government are such as to justify the provisional conclusion that they may be of relevance in this case and, if so, whether questions relating to the validity and interpretation of those grounds are questions of international law.'

The Court went on to consider, not the merits of the substantive issues raised in the case, but simply whether those issues appeared to involve questions of international law or treaty. Thus, with reference to an issue

<sup>1</sup> Series B, No. 4, at p. 24.

arising on Article IV of the so-called Washington Accord of 1946 between Switzerland and the United States, the Court said (*ibid.*):

'The interpretation of these terms is a question of international law which affects the merits of the dispute. At the present stage of the proceedings it is sufficient for the Court to note that Article IV of the Washington Accord may be of relevance for the solution of the present dispute and that its interpretation relates to international law.'

Finally with regard to the Swiss invocation of certain arbitral clauses as being applicable to the dispute, the Court said (*ibid.*):

'The interpretation and application of these provisions relating to arbitration and conciliation involve questions of international law.'

Similarly, Judge Klaestad, in the *Indian Land Passage* case (jurisdiction) —differing from the Court, which in that particular case did not apply the 'provisional' principle, said (*I.C.J.*, 1957, p. 164):

'India contends that the Court lacks jurisdiction because the present dispute concerning Portugal's alleged right of passage over Indian territory between Daman and the enclaves and between the enclaves themselves relates to questions which fall exclusively within the national jurisdiction of India.

'The legal principle applicable to a question of this kind was formulated by the Permanent Court of International Justice in its Advisory Opinion concerning *Nationality Decrees issued in Tunis and Morocco*. Applying that principle to the circumstances of the preliminary phase of the present dispute, I shall have to examine in a summary and provisional manner whether the legal grounds invoked by the Government of Portugal may justify the provisional conclusion that they are of juridical importance for the dispute and, if so, whether these grounds relate to questions of international law.'

Judge Klaestad then referred to the fact that the plaintiff State, Portugal, invoked a Treaty of 1779 as conferring on it rights of sovereignty over certain enclaves in India, while the defendant State, India, argued that the Treaty only conferred on Portugal certain lesser rights. Portugal also invoked a Convention of 1785, and argued that a provision of it recognized a Portuguese right of passage over certain territory. As to this Judge Klaestad said (*ibid.*):

'Whether this view is justified or not may depend on the interpretation of this Convention and would consequently relate to a question of international law.'

He then went on to refer to a local usage or custom relied on by Portugal, and said (*ibid.*, p. 165):

'The question whether a possible usage with regard to passage between Daman and the enclaves was exercised in such a manner as to satisfy the requirements of Article 38, paragraph 1(b), of the Statute of the Court is a question of international law (compare Judgement in the *Asylum* case, *I.C.J. Reports*, 1950, pp. 276-277).'

Similarly (*ibid.*):

'The Government of Portugal finally invokes an alleged international general custom

as well as general principles of law recognized by civilized nations (Statute, Article 38, paragraphs 1(b) and (c), while the Government of India, refuting the Portuguese allegations in this respect, places itself upon the same ground of international law.'

Judge Klaestad then summed up as follows (*ibid.*):

'It is unnecessary to pursue this summary and provisional examination of the legal grounds invoked by the Government of Portugal in order to form an opinion upon the nature of the dispute. This examination is sufficient to show that in any case some of these grounds may be of juridical importance for the present dispute and that they relate to questions of international law. It is in my view evident that the subject-matter of the dispute can only be decided on the ground of international law, and that it cannot be considered as relating to 'questions which by international law fall exclusively within the jurisdiction of India'. I am therefore unable to accept the Fifth Preliminary Objection.'

After this Judge Klaestad explained why he did not agree with the Court that the jurisdictional issue should be joined to the merits (*ibid.*):

'With regard to the question whether this Objection should be rejected or joined to the merits, opinions have differed. In my view it should be rejected, since a summary and provisional examination of the legal grounds invoked by Portugal has in a sufficient measure disclosed elements of international law which may be of relevance for the decision of the dispute.'

Judge Klaestad ended up by emphasizing the distinction between a finding as to the *nature* of a dispute, and a finding as to the merits of that dispute itself (*ibid.*):

'This provisional finding as to the nature of the dispute does not in any way pre-judge the consideration of the merits. The preliminary question whether the Court has jurisdiction to decide these merits should be distinguished from the actual exercise of that jurisdiction.'

(d) *Evaluation of the 'provisional' principle.* It appears from the above that in the *Indian Land Passage* case Judge Klaestad applied the 'provisional' principle, whereas the Court did not, but simply joined the domestic jurisdiction to the merits (thereby not at that stage reaching even a provisional conclusion as to whether the matter was or was not one of domestic jurisdiction). On the other hand, in the subsequent *Interhandel* case, the Court did apply the 'provisional' principle. These different findings raise the question of what the proper sphere of application of that principle is.

(i) *Position of the defendant State.* The main reason for applying the 'provisional' principle has already been pointed out in subsection 2 (b) above. If, because of the close relationship that normally—indeed almost invariably—exists between the jurisdictional issues arising on a preliminary objection of domestic jurisdiction, and the issues arising on the merits of the dispute, the Court always joined the objection to the merits, then, as Judge Chagla (Indian judge *ad hoc*) said in the *Indian Land Passage* case, '... it would never be open to a State to take a Preliminary Objection on this



ground'. Consequently the main purpose of the 'provisional' theory is to avoid nullifying most of the significance of the plea of domestic jurisdiction when put forward not merely as a defence on the merits, but as a bar even to a consideration of them by the Court if the plea is upheld. Of course if there is a joinder, the Court will still not *pronounce* on the merits if it eventually upholds the jurisdictional plea; but it will have gone into them, and the parties will have had to argue them—which is precisely one of the things that the original jurisdictional plea would have aimed at avoiding. It may be argued that the advantage to the defendant of applying the 'provisional' theory, as opposed to an immediate joinder, is more apparent than real on account of the unlikelihood in general that the Court will *not* find (on a 'provisional' basis) that international law or treaty considerations appear *prima facie* to be relevant to a determination of the dispute. Thus in the *Interhandel* case, Sir Hersch Lauterpacht said (*I.C.J.*, 1959, p. 121):

'The Court has rejected Preliminary Objection 4 (*b*) by reference to the principle enunciated by the Permanent Court of International Justice in the Advisory Opinion on *Nationality Decrees in Tunis and Morocco* (P.C.I.J., Series B, No. 4). I concur in that result although it is clear that the test adopted by reference to that Opinion reduces to the bare minimum the practical effect envisaged by the reservation in question. For it is not often that a case may arise in which the grounds of international law relied upon by the applicant State are not, upon provisional examination, relevant to the issue.'

However that may be, the application of the 'provisional' theory nevertheless always admits of the possibility that—no relevant international law or treaty considerations appearing to exist—the plea of domestic jurisdiction will be upheld, so that the case will end there and then without any inquiry into the merits.

(ii) *Position of the plaintiff State*. But just as the non-application of the 'provisional' principle may be unfair to the defendant State alleging domestic jurisdiction, so equally may its application work unfairly for the plaintiff State denying it, and putting forward international law or treaty grounds, in that type of case in which it seems that only after a full inquiry into the merits can it be established for certain whether such grounds exist or not. If in such a case the Court applies the 'provisional' principle, it may shut out the plaintiff State on insufficient grounds. As Professor Waldock has said,<sup>1</sup>

'The chief danger of the "provisional view" theory is that the Court, by confining itself to a summary investigation of the issues, may fail to be convinced of the existence of international elements in the plaintiff's claim of which it might have been convinced after a full hearing on the merits.'

Judge Klaestad implicitly recognized the validity in principle of this point

<sup>1</sup> Loc. cit. [on p. 197, above, n. 2], p. 113.

of view when in the *Indian Land Passage* case he *rejected* a joinder on the ground that in that case a 'summary and provisional examination of the legal grounds invoked by Portugal' disclosed '*in a sufficient measure* [italics added] . . . elements of international law which may be of relevance for the decision of the dispute'.<sup>1</sup> The importance of the words italicized in this pronouncement of Judge Klaestad should not be underestimated, for the result of the second phase of the *Ambatielos* case—though not relating to the question of domestic jurisdiction as such—showed very clearly what can happen when a tribunal called upon to determine whether a claim is 'based on' a certain treaty decides that question in the affirmative merely by registering the fact that because one party alleges the relevance of the treaty and the other denies it, there is a *dispute* about its relevance; instead of deciding on a substantive basis whether the treaty is in fact at least *relevant* to the claim (though not of course deciding the ultimate merits of the claim on the basis of the treaty, should it in fact prove relevant).<sup>2</sup> Admittedly, in that case, the Court in effect found in *favour* of jurisdiction, thus not shutting out the plaintiff State. The case none the less illustrates the possible dangers of decisions based on a mere registering of the fact that the relevance of a treaty (or rule of international law) is in dispute, without considering in that connexion the substantive issues that might conclusively determine the question of relevance.

(iii) *Attitude of the Court in the Indian Land Passage case.* There may be another ground for a joinder, namely, that the case is of such a nature that the jurisdictional issue cannot even provisionally be determined without *prejudging* the merits. This, of course, is a common ground of joinder, potentially applicable in the case of all preliminary objections and not peculiar to the issue of domestic jurisdiction. In deciding on a joinder in the *Indian Land Passage* case, the Court seems to have been actuated chiefly by this type of consideration, as the second italicized passage (italics added) in the quotation next to be given shows (but the first italicized passage (italics added) seems to indicate that the Court was equally to some extent influenced by the considerations discussed in subsection (ii) above). The Court began by referring to the Indian contention that the Portuguese claim to a right of transit across certain (Indian) territory could not be regarded 'as a reasonably arguable course of action under international law' (i.e. as warranting even a provisional determination that the case was not one of domestic jurisdiction), unless the right of transit in question was 'based on the express grant or specific consent of the territorial sovereign', and that (according to India) 'the facts presented to the Court in the Pleadings of

<sup>1</sup> *I.C.J.*, 1957, p. 164.

<sup>2</sup> An extended analysis of the jurisdictional aspects of the *Ambatielos* case will be found in the article in this Series contained in the 1958 *Year Book*, Division A, § 1, parts (II) and (III).

the Parties show no such express grant or specific consent of the territorial sovereign as could place a limitation on the exercise of India's jurisdiction. . . .<sup>1</sup> After citing certain further Indian contentions on the domestic jurisdiction issue the Court then pronounced as follows:

'The facts on which those Submissions of the Government of India are based are not admitted by Portugal. The elucidation of those facts, and their legal consequences, involves an examination of the actual practice of the British, Indian and Portuguese authorities in the matter of the right of passage—in particular as to the extent to which that practice can be interpreted, and was interpreted by the Parties, as signifying that the right of passage is a question which according to international law is exclusively within the domestic jurisdiction of the territorial sovereign. There is the further question as to the legal significance of the practice followed by the British and Portuguese authorities, namely, whether that practice was expressive of the common agreement of the Parties as to the exclusiveness of the rights of domestic jurisdiction or whether it provided a basis for a resulting legal right in favour of Portugal. There is, again, the question of the legal effect and of the circumstances surrounding the application of Article 17 of the Treaty of 1779 and of the Mahratha Decrees issued in pursuance thereof.

'Having regard to all these and similar questions, it is not possible to pronounce upon the Fifth Preliminary Objection at this stage *without prejudging the merits*. Accordingly, the Court decides to join that Objection to the merits.'

The significance of the second italicized passage in the above citation is clear. That of the first is less so. Its meaning would, however, appear to be that, in the opinion of the Court, the question whether a certain practice of the parties in the matter of passage gave rise to, or was carried out in the exercise of, rights under international law, depended very largely on whether the parties had themselves regarded it as so doing, or had on the other hand regarded it as something accorded *ex gratia* by the territorial sovereign in a sphere lying within his sole discretion; and that this was a question that could only be decided after a full investigation of all the substantive facts. If this is so, then it would seem that the Court was here basing itself on the principle stated in subsection (ii) above—namely, that the 'provisional view' principle should not be applied (and that there should be a joinder) in any case where it appears that the very question of the *prima facie* relevance of international law or treaty to the dispute cannot be decided until the merits of the dispute have been gone into.

#### § 4. THE PRINCIPLE OF GOOD FAITH

##### (1) *The principle affirmed*

Earlier applications of or pronouncements on the principle of good faith, whether on the part of the Court itself or of individual judges, have been noticed previously in this series under various heads—in particular that of 'Abuse of Rights'.<sup>1</sup> During the period now under review, the Court itself

<sup>1</sup> See this *Year Book*, 27 (1950), § 3 on pp. 4-7, and § 11 on pp. 12-14; and *ibid.*, 30 (1953), § 9 on pp. 53-54.



made no pronouncement on the matter, but there were dicta by individual judges. An unequivocal general affirmation of the principle was made by Sir Hersch Lauterpacht in the *Norwegian Loans* case when he said (*I.C.J.*, 1957, p. 53) that

‘Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law.’<sup>1</sup>

There are certainly reasons (which will be considered presently—see subsection 3 (b) below) for thinking that it is precisely in the international field, and as a part of international law, that the principle of good faith should find its most important application. Sir Percy Spender also, in the *Guardianship of Infants* case, affirmed the principle of good faith as follows<sup>2</sup> (*I.C.J.*, 1958, p. 120):

‘If in a particular case it could be shown that a law comparable to the relevant provisions of the Swedish law had been used by a contracting State not *bona fide* to carry out that law but for a purpose *aliunde*, for example to interfere with and restrict a guardian in the exercise of his right of custody and control as such, other and quite different considerations would arise. But that is not the instant case. The Netherlands has very properly conceded that Sweden acted in complete good faith under the provisions of its law.’

This pronouncement may be compared with another by Sir Hersch Lauterpacht in the *Norwegian Loans* case (*I.C.J.*, 1957, p. 37):

‘There may be little difference [i.e. as regards its injurious effect] between a Government breaking unlawfully a contract with an alien and a Government causing legislation to be enacted which makes it impossible for it to comply with the contract.’

Although this pronouncement was made directly in connexion with the question whether domestic law could override an international obligation, or more accurately confer exemption from it (and, in yet more general terms, whether it could oust international law from application to the case), and has been cited as such in § 1 above, it also illustrates the principle of good faith; for an excellent example of action in bad faith, or of an abuse of rights, would consist in the avoidance of an international obligation by the enactment or application of laws which, while not involving a direct incompatibility with the obligation, enabled the substance of it not to be performed in practice.

## (2) *Nature of the principle—is the subjective element essential?*

It may be useful at this point to draw attention to—without attempting entirely to resolve—a difficulty that arises in the application of the principle

<sup>1</sup> The reference to ‘a general principle of law’ was clearly intended as a reference to Article 38, paragraph 1 (c), of the Statute of the Court.

<sup>2</sup> For the facts here involved see § 1 (2) (e) above.

of good faith. There is always a natural reluctance to ascribe bad faith to States, in the sense of a deliberate intention knowingly to circumvent an international obligation. Is this subjective element an essential ingredient of the concept of bad faith? Possibly, in the case of bad faith considered purely in and of itself, it is such an ingredient. But this would not seem necessarily to apply to an abuse of rights—and it is largely through abuses of rights that actions that may give the impression of being in (deliberate) bad faith are carried out. Thus it will be seen that in the *Guardianship of Infants* case, Sir Percy Spender, in the passage quoted above, made the question of the existence of *deliberate* bad faith the test as to whether ‘a law . . . had been used . . . not *bona fide* to carry out that law but for a purpose *aliunde*, for example . . . etc.’ He then, however, continued: ‘But that is not the instant case. The Netherlands has very properly conceded that Sweden acted in complete good faith under the provisions of its law.’ No one of course doubted or can doubt that. Nevertheless, Sir Hersch Lauterpacht found in exactly the opposite sense from Sir Percy Spender in regard to the application of the Swedish law concerned, namely (see § 1 (1) above)<sup>1</sup> that if the application of this law in *fact* involved the non-execution of a Swedish international obligation, then there would be a breach of the obligation—and it is clear that Sir Hersch’s view would not have been affected by the lack of any deliberate intention on the part of Sweden to break or evade its international obligations. It is true that in order to arrive at this result, Sir Hersch did not apply any principle of good or bad faith: he applied the principle of the supremacy of international law (including the obligation to carry out treaties) over domestic law in the international field. It would seem, however, that a very similar result could have been arrived at by an application of the doctrine of *abuse of rights*, provided that this be not regarded as necessarily involving a subjective element of deliberate intent (such as, under most systems of domestic law, is required only in connexion with charges of a criminal character). A motorist who, however unintentionally, crashes into another car incurs civil liability if he has been guilty of negligence. A State which, though not with the actual object of breaking an international obligation as such, uses its right to apply certain laws, or to apply them in a certain way, in such a manner that the obligation is not in fact carried out, may be said to have committed an abuse of rights. How far abuse of rights involves *per se* direct international responsibility, or as such gives rise to an obligation to discontinue the action in question, or to afford reparation, cannot now be gone into, although some observations pertinent to the matter will be found in the next succeeding subsection.

<sup>1</sup> The interpretational issue involved will be discussed more fully in a later article on questions of treaty interpretation arising during the period under review.

(3) *Limitations on the application of the principle of good faith*

It has been suggested<sup>1</sup> that that aspect of the principle of good faith which consists of the avoidance of any abuse of rights operates mainly as a long-term element producing gradual changes in customary international law—that is to say if certain rights are constantly exercised abusively, there will be a tendency for international law eventually to evolve a rule placing a positive limitation on the exercise of those rights. Certainly there are obvious difficulties—though there may not be any absolute impossibility—in regarding an abuse of rights as a factor giving rise to direct *ad hoc* international responsibility. At the same time, as will be seen presently, it does not follow that an abuse of rights cannot have any direct immediate consequences at all. In the *Norwegian Loans* case, however, Sir Hersch Lauterpacht, though in connexion with the particular question of the so-called ‘automatic’ type reservation to an acceptance of the Court’s compulsory jurisdiction, suggested a more drastic limitation on the application of the principle of good faith. He explained that he had re-examined a view previously entertained by him, to the effect that since the automatic reservation of matters of domestic jurisdiction as determined by the Government making the optional clause declaration must be regarded as being subject to a legal obligation to make the determination in good faith, such a reservation could to that extent be regarded as valid. He then continued as follows (*I.C.J.*, 1957, pp. 52–53):

‘In the light of further study of this question in connection with the present case, I do not feel it possible to adhere to that view. The legal obligation of a Government to avail itself of its freedom of action in a manner consistent with good faith has a meaning, in terms of legal obligation, only when room is left for an impartial finding whether the duty to act in accordance with good faith has been complied with. But in the case now before the Court any such possibility has been expressly excluded. The Court has no power to give a decision on the question whether a State has acted in good faith in claiming that a dispute covers a matter which is essentially within its domestic jurisdiction. If the Court were to do so, it would be arrogating to itself a power which has been expressly denied to it.’

This view may be correct, but it is open to certain queries to which it seems worth calling attention without attempting to come to any final conclusion on an obviously difficult question.

(a) There are first of all two purely logical and technical queries, proceeding from the fact (and see *per* Sir Hersch Lauterpacht in the first statement quoted on p. 208 above, which was made in connexion with the present issue) that it can hardly be open to question that, if a Government does append an ‘automatic’ reservation to its acceptance of the Court’s compul-

<sup>1</sup> See Sir Hersch Lauterpacht’s *The Function of Law in the International Community* (Oxford, 1933), chapter xiv, pp. 286–306.



sory jurisdiction, it is at the least under an obligation to employ good faith in making any determination under that reservation. The question of the validity of this type of reservation will be considered in a later article on the purely jurisdictional questions arising in the period under review; but assuming for present purposes that there is no basic invalidity, it would still be necessary that any exercise of the reservation should be carried out in good faith. On that footing the following questions may be asked:

(i) Does it follow from the fact that a State has reserved to itself the determination of a certain issue (e.g. whether a given matter is one of domestic jurisdiction) that it has also, and thereby, reserved to itself the additional right of determining whether its substantive determination of that matter has been carried out in good faith? Clearly, in logic, it does not follow.

(ii) Accordingly, if the issue of good faith is not for the State concerned, it must be for the Court. Would it not then follow that although, provided the determination had been made in good faith, the Court would be obliged to accept it, even if it disagreed with it and thought it incorrect, yet this would not be the case if it appeared that the determination had not been made in good faith?

(iii) The final question—material to the difficult issue of proof—would then be whether an inference or presumption of *lack* of good faith would not arise *ipso facto* from certain kinds of determinations, or from determinations made in certain circumstances.

Further reference to the last query will be made later, but should the answer to it be in the affirmative, this would go far to meet Sir Hersch Lauterpacht's difficulty in connexion with the automatic reservation of domestic jurisdiction, that practically anything can, without *obvious* bad faith, be represented as coming under that head—a difficulty, it may also be noted, that is specially prominent in the case of domestic jurisdiction reservations, and that would not necessarily apply to automatic reservations of other kinds of disputes, in relation to which there might well be little room for doubt as to whether a given determination had or had not been made in good faith. But even in regard to domestic jurisdiction—while it may be true that many, even most things, can colourably be brought under that head—it is certainly not the case that this can always be done so plausibly that grave suspicion of bad faith will not arise—while certain kinds of determinations must raise an actual presumption of bad faith that could only be rebutted by convincing evidence to the contrary.

(b) A second general objection to the view that lack of good faith can be admitted as invalidating only if there is a possibility of establishing the allegation before some impartial forum is that it is precisely the difficulty of obtaining impartial adjudications—or even any adjudication at all—of disputed issues of international law that makes or creates for States an added obligation to conform to the requirement of action in good faith and the avoidance of abuses of rights. The present writer has suggested

elsewhere<sup>1</sup> that this very fact may create for States an international legal duty to act *uberrimae fidei*, not only in the discharge of obligations they acknowledge the law to impose, but also in the exercise of the rights and liberties it confers. The duty of conduct *uberrimae fidei*, as is well known, normally arises with reference to certain contracts, such as contracts of insurance, where one of the parties, in order to assess the risk or other material factors involved, is obliged to rely on information supplied by the other party, and lying peculiarly, or exclusively, within that party's knowledge. A somewhat similar situation can arise in inter-State relations, and an application of the same principle (as was indicated in earlier articles in this Series)<sup>2</sup> was made in the *Corfu* case (merits),<sup>3</sup> where the Court and certain individual judges seem to have taken the view that the very fact that a State had exclusive control over its own territory, in which no other State could carry on any public activity without its consent, might place it under a special duty to account for what occurred there, furnish information, &c.<sup>4</sup> An analogous principle was applied in the *Island of Palmas* case<sup>5</sup> where the Arbitrator pointed out that the very nature of the exclusive jurisdiction exercised by a State in its own territory had as its corollary the duty to protect foreign rights and interests there. This duty, and in particular the duty of acting in good faith in carrying it out, is of course enhanced by the fact that not only is there, as a rule, no certainty that an aggrieved foreign State will be able to bring the matter before an international tribunal or other appropriate forum, or obtain the enforcement of any finding given in its favour if it does, but also that self-help in the shape of recourse to force is now in general<sup>6</sup> ruled out as a method of asserting State rights. It would be paradoxical indeed if the very absence of any certain method of asserting a right to action in good faith by other States were to be regarded as negating the existence of the right itself. Moreover, such a doctrine would be destructive of the obligatory force of a large part of international law, for similar disabilities exist in regard to the enforcement of most international obligations. This is not, of course, what Sir Hersch Lauterpacht intended to imply. He was dealing with a particular case. But if it is correct, as was suggested, though not positively affirmed, in subsection (a) above, that a tribunal such as the International Court would

<sup>1</sup> Loc. cit. on p. 188, above, nn. 4 and 5, pp. 54-55.

<sup>2</sup> See this *Year Book*, 29 (1952), subsection (c) on pp. 58-59.

<sup>3</sup> See *ibid.*, p. 59.

<sup>4</sup> See this *Year Book*, 27 (1950), chap. ii, § 2 (a) and (b) on pp. 19-22.

<sup>5</sup> U.N. Series of *Reports of International Arbitral Awards*, vol. ii; and *American Journal of International Law*, 21 (1928).

<sup>6</sup> That there are circumstances, other than the obvious case of individual or collective self-defence against armed attack, which may legitimately admit of some use of force hardly admits of doubt. But the subject is a difficult one. See Waldock, 'The Regulation of the Use of Force by Individual States' in *Recueil des Cours*, 81 (1952), ii, p. 455; Bowett, 'The Use of Force in the Protection of Nationals', *Transactions of the Grotius Society*, 43 (1959), p. 111; and the present writer in loc. cit. on p. 188, above, nn. 4 and 5, pp. 171-4.

not be precluded by the existence of an automatic reservation from inquiring whether the reservation was being applied in good faith, then, as was also suggested above, the particular difficulty felt by Sir Hersch Lauterpacht would cease to exist—though, of course, this type of reservation would not thereby become automatically validated.

(c) The final query to be discussed involves reverting to the question of the extent to which it is actually possible to conduct a useful inquiry into allegations of action in bad faith. This must depend on the facts of each particular case. In many cases it will not be possible to do so, and the natural presumption—which undoubtedly exists (a significant fact in itself)—of action in good faith will prevail. Probably this must be so as regards any issue of good or bad faith pure and simple, in all but that class of case to which the maxim *res ipsa loquitur* would apply. But such cases do exist. In the immediate context, the point can best be illustrated with reference to that kind of action in bad faith that involves an abuse of rights, and with reference to that kind of abuse of rights which would arise if a State, having entered an automatic type reservation to its optional clause acceptance, were to abuse its right to invoke the reservation, by excluding a dispute clearly not falling within even the *class* of subject-matter to which the automatic reservation related. In connexion with his contention that in relation to such a matter as domestic jurisdiction an abuse of rights of this kind could never be established, because of the ease with which almost all matters can plausibly be alleged to be of domestic jurisdiction, Sir Hersch Lauterpacht gave, as an extreme illustration in the *Norwegian Loans* case, the case of a dispute about the right to sovereignty over certain territory. He stated the point at issue by first citing (*I.C.J.*, 1957, p. 53) an excerpt from one of the Norwegian written pleadings, as follows:

‘Of course, such a reservation must be interpreted in good faith and should a government seek to rely upon it with a view to denying the jurisdiction of the Court in a case which manifestly did not involve a “matter which is essentially within the national jurisdiction” it would be committing an *abus de droit* which would not prevent the Court from acting.’

Denying that the Court had any such power, Sir Hersch continued (*ibid.*):

‘As already stated, in view of the comprehensiveness of the term “matters essentially within domestic jurisdiction”, it is not easy to conceive situations of any such obviousness. It is not certain that a State would be acting flagrantly and irrefutably in disregard of the canons of good faith if it were to determine most disputes as coming within its domestic jurisdiction.’

Then, after giving various illustrations, Sir Hersch said (*loc. cit.*, p. 54):

‘The only disputes which, it might appear, are outside the category [i.e. of domestic jurisdiction] are territorial disputes. But even that is not certain. In fact it has been



suggested that territorial disputes pertain to matters of domestic jurisdiction. In the communication addressed on May 4th, 1955, by the Government of Argentina to the United Kingdom in the matter of disputed sovereignty over certain Antarctic territories one of the reasons adduced in support of the refusal of the former Government to submit the issue to this Court was that the Government of the United Kingdom had, in its acceptance of the Optional Clause, itself excluded from the competence of the Court questions within its exclusive jurisdiction. The contention that a territorial dispute involves a matter within the domestic jurisdiction of a State may be farfetched, but has the Court been given the power to say that any such assertion is obviously in bad faith, that it constitutes an abuse of a right, that it must be ignored or overridden, and that the Court has jurisdiction notwithstanding the determination to the contrary by the State in question?

It should be stated at once that in the particular case instanced by Sir Hersch, the question of bad faith as such, or of abuse of rights, could not arise, because Argentina had never accepted the compulsory jurisdiction of the Court, and the use or abuse of an automatic reservation of matters of domestic jurisdiction could not therefore arise either.<sup>1</sup> In those circumstances the Argentine Government's references to the United Kingdom's reservation of domestic jurisdiction (which, incidentally, related to matters which '*by international law*' were matters of domestic jurisdiction, and was not in the automatic form 'as determined by the United Kingdom') can only be regarded as a case of the use of diplomatic language, in much the same way as an unwanted visitor is told 'not at home', or an unacceptable invitation is refused on the ground of 'a previous engagement'. Suppose, however, a case in which there did exist an automatic reservation, not reserving a particular territorial dispute, *eo nomine*, or territorial disputes as a class (either of which courses would naturally be legitimate), but simply reserving matters of domestic jurisdiction as determined by the country concerned, and this reservation is then invoked in order to exclude an ordinary dispute relating to territorial sovereignty over a piece of territory, it being quite clear on the face of it that the ordinary rules of international law governing territorial sovereignty, and possibly also certain treaties, are relevant to the determination of this issue. Could it really be said that to invoke the automatic reservation in those circumstances on the plea of domestic jurisdiction was not an act of bad faith—or, without going so far as that (since charges of bad faith as such tend to be invidious), would it not

<sup>1</sup> In its communication to the United Kingdom Government, rejecting arbitration, the Argentine Government cited the United Kingdom reservation to its optional clause acceptance as evidence that matters of domestic jurisdiction were in principle excluded from international adjudication. But the Argentine Government then went on to base its contention that the subject-matter of the dispute was one of Argentine domestic jurisdiction on the fact that (in the Argentine view) the disputed territory was Argentine—which of course begged the whole question—since whether the territory was Argentine was the very matter in dispute. On that basis no territorial dispute would ever be justiciable, and it seems clear that international tribunals need not accept such a contention merely because of an 'automatic' reservation of domestic jurisdiction as determined by the reserving State.

be an abuse of rights, i.e. of the right taken by the reservation to exclude a certain kind of dispute? It is no answer to say the right includes the right to determine the extent of the right, for the technical 'right' to do that is not contested—otherwise the question of abuse of rights would not be material. What can be asserted is that the right would, in such a case, be exercised in an abusive way, and that such an assertion in this type of case would almost certainly survive even the very severe test propounded by Sir Hersch Lauterpacht in the following passage (*ibid.*):

'Any attempt to embark upon the examination of the question whether a Government has acted in bad faith in determining that a matter is essentially within its domestic jurisdiction may involve an exacting enquiry into the merits of the dispute—an enquiry so exacting that it could claim to determine, with full assurance, that the juridical view advanced by a Government is so demonstrably and palpably wrong and so arbitrary as to amount to an assertion made in bad faith. Only an enquiry into the merits can determine that although an assertion made by the defendant Government is not legally well-founded it is nevertheless reasonable; or that although it is not reasonable, it is not wholly arbitrary.'

Sir Hersch, however, went even further (*loc. cit.*, pp. 54-55):

'The "automatic reservation" is couched in terms so comprehensive as to preclude the Court from reviewing it or interpreting it away not only by reference to an assertion of abuse of a right by the defendant State but also in any other way. Thus, for instance, it is not open to the Court to disregard that reservation by reference to some such argument as that the right of exclusive determination pertains only to matters which are "essentially within domestic jurisdiction"; that a matter which is clearly governed by international law, because of international custom or treaty, is not essentially within the domestic jurisdiction of a State; and that, therefore, such matters are neither within the scope of the reservation nor within the power of the accepting State to determine unilaterally whether the dispute is within the domestic jurisdiction. It is not easy to find a legal limit to the right of the accepting State which has appended a reservation of this kind to decline the jurisdiction of the Court.'

In the opinion of the present writer this passage, striking though it is, and carrying the logic of the argument to its ultimate limit, is nevertheless difficult to reconcile with the finding both of the Permanent Court and of the present Court (*vide supra*), that matters 'clearly governed by international law, because of international custom or treaty' *simply are not* matters of domestic jurisdiction. A determination that such a matter is one of domestic jurisdiction, carried out for the express purpose of excluding a dispute about it from the scope of an optional clause acceptance, and by invoking an 'automatic' reservation of domestic jurisdiction, may be within the rights of the State concerned, but it is an abuse of those rights.<sup>1</sup>

<sup>1</sup> Since Sir Hersch Lauterpacht took the view (this will be considered in a later article) that an automatic reservation is not only itself invalid, but also invalidates the whole of the reserving State's acceptance of the Court's compulsory jurisdiction, he tended to reject any view which would have reconciled the exercise of these automatic reservations with the possibility that the Court could, within limits, control the legitimacy of such exercise in the given case—a view that

(d) There remains the question what legal consequences can be given to an abuse of rights. This is too big a question to be gone into here. But it was suggested that the difficulty that might well exist in many cases of attaching direct State responsibility to such an action did not mean that no legal consequences at all could ensue. The case of an abusive exercise of an automatic reservation is a case in point. For if the Court were to take the view suggested in the preceding subsections, it could reject the determination of the State concerned as abusive and invalid, and hold itself competent to hear and determine the case. Any failure of the State concerned to appear and argue its case would then lead to judgment being given against it under Article 53 of the Court's Statute, if the Court, being satisfied (as *ex hypothesi* it would be) that it had jurisdiction, considered the claim of the other party to be 'well founded in fact and law'.

### § 5. AFFIRMATIONS OF CERTAIN GENERAL LEGAL MAXIMS

#### (1) *Cessante ratione, cessat ipsa lex*

(a) *Disappearance of a rule.* In its advisory opinion in the *South-West Africa* case, the Court had found the former League of Nations Mandate for that territory to be still in force, and the Union of South Africa to be still bound by it. It also found that the United Nations had inherited the supervisory functions of the former League in respect of Mandated Territories.<sup>1</sup> However, it qualified its findings in two important respects, namely, these functions must be exercised so far as possible in accordance with League procedure, and they must not be exercised so as to create for the Mandatory Power a more burdensome or onerous situation than had existed under the League system.<sup>2</sup> The further consequences of these findings and qualifications were subsequently considered by the Court in the *South-West Africa Voting Procedure* and *Petitioners* cases, which, in their substantive aspects, will be considered in a later article in the present series. In the *Petitioners* case, however, Sir Hersch Lauterpacht, while agreeing with the '*dispositif*' of the Court's Opinion, did not entirely agree with the view taken by the Court as to whether the hearing of oral petitions by the United Nations Assembly would go beyond League practice as to Mandates, and would therefore be inconsistent with the main South-West Africa Opinion given on July 11th, 1950. On the contrary, he thought that *in principle*, hearings of oral petitions would be 'inconsistent with the Opinion of 11 July, 1950, inasmuch as they depart from the system which obtained under the League of Nations'.<sup>3</sup> But he also connected the

would have made it difficult to regard this type of reservation as necessarily and always invalid *in se*.

<sup>1</sup> See this *Year Book*, 27 (1950), p. 19; and 29 (1952), pp. 8-10.

<sup>2</sup> *I.C.J. Reports*, 1950, p. 138.

<sup>3</sup> *Ibid.*, 1956, p. 57.



fact that it was not the practice of the League to hear petitions with the further fact that the League did not need to do so because it was in possession of other sources of information, and in particular of reports from the Mandatory Power, which the latter was no longer furnishing:<sup>1</sup> '... as explained', he said, the League system 'was predicated on the fulfilment by the Mandatory of his [*sic*] obligations in the matter of reports and petitions'.<sup>2</sup> He then continued applying the *cessante ratione* maxim (*I.C.J.*, 1956, p. 57):

'As the result of the attitude now adopted by the Union of South Africa, that assumption no longer applies. The maxim *cessante ratione cessat lex ipsa* is a trite legal proposition. This circumstance does not affect the propriety and the necessity of its judicial application.'

While the more substantive aspects of this matter will be considered in a later article,<sup>3</sup> it is submitted that the *cessante ratione* principle, while certainly constituting, as Sir Hersch Lauterpacht said, proper matter for judicial application, needs also to be applied with a very considerable measure of that judicial caution which, in his latest work,<sup>4</sup> he equally emphasized as representing one of the basic attitudes both of the International Court and the former Permanent Court. There is a distinct family resemblance between the *cessante ratione* principle and those principles of treaty law which may cause a treaty that is spent or obsolete, or has lost its *raison d'être*, to be regarded as ceasing to have force, or as being no longer operative.<sup>5</sup> Such principles are indeed really special applications of the *cessante* principle and, as is well known, need to be applied with some hesitation.<sup>6</sup> Moreover—and this is the real point—it is but a step from these principles to the (theoretically different but not unrelated) principle or doctrine of *rebus sic stantibus*. Was not Sir Hersch Lauterpacht indeed applying a sort of generalized principle of *rebus sic stantibus*, translated from the field of treaty to that of customary law? His proposition seems to have been that things had changed because the Mandatory Power (taking the view—see n. 1 below—that the Mandate has ceased to be in force) no longer furnished the reports and other information it used to do—and

<sup>1</sup> It will be appreciated that the main South-West Africa Opinion of the Court, being an advisory opinion, was not binding on the Government of South Africa, and that this Government had never departed from its view that, with the demise of the League of Nations, the Mandate for South-West Africa had lapsed.

<sup>2</sup> See reference as given on p. 216, n. 3. The merits of this view are not under discussion here. They will be considered in a later article.

<sup>3</sup> i.e. on the more specifically United Nations aspects of the matter.

<sup>4</sup> *The Development of International Law by the International Court* (Stevens & Sons Ltd., London, 1958)—see especially Part Two.

<sup>5</sup> See the present writer's Reports on the Law of Treaties drafted for the International Law Commission of the United Nations, especially the Second Report, on the 'Termination of Treaties', in the *Yearbook of the International Law Commission* (1957), vol. 2, at pp. 29 and 49-52.

<sup>6</sup> See *ibid.* at pp. 32-33 and 56-65 *passim*.

that this change justified a departure from an otherwise established rule or practice because the latter had been predicated upon the assumption that certain things would be done which were no longer being done. The same result could, it would seem, have been achieved without invoking the *cessante ratione* principle, on the simple basis that as the Mandatory Power was, according to the view taken by the Court, in breach of its obligations under an instrument considered to be still binding on it, it could no longer claim the benefit of limitations or safeguards instituted by the Mandate in its favour, or deriving from the Mandate.

*Conclusion.* It is generally admitted that the principle *rebus sic stantibus*—in so far as allowable at all (and some authorities do not allow it)<sup>1</sup> is one that needs to be applied with the greatest degree of caution, and subject to the most stringent safeguards.<sup>2</sup> If the *cessante ratione* principle could be submitted to systematic analysis, it would probably be found that a similar degree of caution in its application, and the institution of similar safeguards, would be appropriate—for nothing would be easier in many cases than to allege plausible grounds for the view that the original reasons for a given rule of law had disappeared or fundamentally changed, entailing a supposed corresponding disappearance of or change in the law. The validity of the principle itself cannot be doubted, but it requires to be interpreted strictly, and to be resorted to only on incontestable grounds of fact, giving rise to something like a virtual impossibility or futility in the continued application of the law or rule concerned.

(b) *Consequential disappearance of an exception to a rule.* In the same case, and basing himself on the same facts—namely that in its main South-West Africa Opinion of 1950 the Court had laid down a rule (i.e. that the Mandate was still in force, and that the United Nations had inherited the supervisory functions of the former League of Nations in respect of it), but had made certain qualifications or exceptions to this rule (as to which see the opening part of subsection (a) immediately above)—Sir Hersch Lauterpacht again took the view that the behaviour of the Mandatory Power had affected the whole operation of the Mandates system in respect of South-West Africa, which the Court had found must be regarded as continuing in existence; and that, in consequence, the qualifications or exceptions which the Court, in its previous opinion, had provided for in favour of the Mandatory Power must equally be regarded as no longer operative. In short, as the Mandatory was no longer furnishing the reports

<sup>1</sup> As for instance Bynkershoek, Wildman, Strupp, Lammasch, Grotius, Vattel, Klüber. See generally on this subject the present writer's Report cited on p. 217, n. 5, pp. 56-57, and Chesney Hill, 'The Doctrine of "*Rebus Sic Stantibus*" in International Law', *University of Missouri Studies* (July, 1934), vol. ix, No. 3, *passim*.

<sup>2</sup> Such as are suggested in the present writer's Report cited on p. 217, n. 5—see in particular at pp. 32-33 and 62-65.

and other information required under the Mandate, qualifications such as that the United Nations, in its exercise of the supervisory functions of the former League, must not go beyond League practice, equally no longer applied; and the United Nations could accordingly avail itself of means of information not provided for by the Mandate, or which at any rate it had not been the practice of the League to make use of. After stating that the Court's main South-West Africa Opinion of 1950 'must be read as a comprehensive pronouncement providing for the continuation of the administration and the continued supervision by the United Nations, of the administration of South-West Africa as a Mandated Territory', Sir Hersch Lauterpacht continued (*I.C.J.*, 1956, pp. 44-45):

'The principal means for fulfilling that purpose—namely, annual reports supplied by the Mandatory and written petitions transmitted, commented upon and explained by him before the supervising body—which were in operation under the Mandates System are now in abeyance owing to the attitude adopted by the Union of South Africa. If the Opinion of 11 July 1950 is read as a whole, then it is impossible, without destroying its effect, to maintain fully and literally provisions qualifying the operation of a system whose main characteristics have become inoperative.'

Sir Hersch then concluded (*ibid.*, p. 45):

'It seems unreasonable to uphold fully and literally the limitations of a rule after the possibility of giving effect to the rule itself has disappeared. To do that is to elevate the exception into a rule and to reduce the governing rule to a nullity. A court of law cannot give its sanction to any such simplification of logic.'

This view, and the corresponding view set out in subsection (a) immediately above, is easier of acceptance in the context of the petitioner's case if it is looked at not so much from the standpoint of the Mandatory Power as from that of the Supervisory Authority (the United Nations). It can then with reasonable plausibility be contended that having regard to the overriding purposes of the Mandate, if the Supervisory Authority finds itself (through the acts and omissions of the Mandatory itself) unable to carry out its functions by the prescribed or customary means, it can resort to others so long as these are not inconsistent with the Mandate, or illegal *in se*. This view is indeed not perhaps entirely beyond question, but it is obviously highly tenable. The matter becomes a very different one, however, if viewed from the standpoint of the Mandatory Power; for here something resembling a species of judicial legislation (or perhaps, more accurately, a species of judicial re-writing of an obligation)<sup>1</sup>—namely the substitution of one obligation for a different one—seems to enter in. Sir Hersch Lauterpacht himself appears to have felt that his view might be

<sup>1</sup> In this connexion it is relevant to recall the dictum of the Court in the second phase of the *Peace Treaties* case (*I.C.J.*, 1950, p. 229) to the effect that 'It is the duty of the Court to interpret . . . treaties, not to revise them'.



open to question on some such ground, for immediately following on the last of the above quoted passages, he said (*loc. cit.*):

'Neither can it [i.e. the Court] avoid its judicial duty by declaring that only a political or legislative body is competent to resolve the conflict which has arisen, as the result of the action of a party, between the overriding purpose of the instrument and its individual provisions and limitations. To resolve that conflict, in the light of the instrument as a whole, is an essential function of a judicial tribunal.'

The difficulty may be put as follows. In the ordinary course of law if a person bound by (say) a certain contractual obligation fails to carry it out, he can be made to pay damages, or possibly to make reparation in some other form, or, in certain cases, to execute a specific performance of the obligation—i.e. to carry it out actually and *in concreto*. But he cannot normally be required to carry out a different obligation substituted for the former, merely because the original obligation is not or cannot be carried out. Thus, to take an analogy, if an actor is under contract to appear in a certain performance and fails (without legal grounds) to do so, he may be liable in damages for the resulting box office or other losses, or actually to appear (if that is still possible); but he cannot, normally, be made to appear in quite a different performance instead, or to give a series of broadcast talks in lieu of the original performance. This would be neither to compel him to carry out the obligation contracted for, nor to make reparation<sup>1</sup> for not carrying it out, but to make him carry out a different obligation, not provided for by the contract concerned. Applying this test to the *Petitioners* case (and bearing in mind that a purely legal point is at issue here, and not the merits or otherwise of South African policy in relation to the question of the Mandate for South-West Africa),<sup>2</sup> it would appear that the finding of the Court (which as such will be considered in a later article), and also opinion—based on slightly different reasoning—of Sir Hersch Lauterpacht, amounted in effect to subjecting the Mandatory Power to a new and different obligation—assuming (which was certainly Sir Hersch's view—*vide* under subsection (a) above)—that any system of *oral* petitions would, as he said, 'depart from the system which obtained under the League of Nations'.<sup>3</sup> It may, of course, be contended (and it is such a contention that would furnish the principal justification for Sir Hersch Lauterpacht's view) that a finding to the effect that the *Supervisory Authority* was entitled

<sup>1</sup> At any rate according to the conception of reparation followed by most systems of law—i.e. the payment of a sum of money or its equivalent.

<sup>2</sup> The view suggested here is advanced on purely juridical and objective grounds. It does not involve the taking up of any position on the merits of South African policies in relation to South-West Africa.

<sup>3</sup> The Court itself, however (whatever the merits or otherwise of its view—to be considered in a later article), did not consider that the hearing of oral petitions would actually be a departure from the League system—or at any rate that under this system the League would not have had the *right* to hear such petitions. It therefore automatically (on that view) avoided any inconsistency with its main, 1950, Advisory Opinion.

to avail itself of new and different means of information (giving *it* so to speak a new right) did not constitute placing the *Mandatory Power* under a new or different obligation. It could be argued that the mere *hearing* of oral petitions by the General Assembly of the United Nations in the exercise of its supervisory functions did not in one sense require the Mandatory Power to do anything. However, it did place that Power under a new (and, as Sir Hersch admitted, an additional) *burden*,<sup>1</sup> compared with the League system. Furthermore, just as the League system of written petitions involved for the Mandatory Power an obligation to transmit them, with its comments and explanations, and to answer any questions raised on them by the Supervisory Authority, so also would a system of oral petitions (if valid and obligatory) involve certain obligations for the Mandatory, i.e. to allow the petitioner to leave the Mandated Territory to proceed to the seat of the Supervisory Authority; to facilitate in some degree the journey (e.g. by the grant of a passport and any necessary endorsements); and to furnish such comments and explanations on the petition when made, as the Supervisory Authority might request. It must be concluded therefore that, from the standpoint of the general principles of law, the view acted on by Sir Hersch Lauterpacht was decidedly innovatory, and came close to the limits of the judicial function in so far as it involved in a certain sense a judicial rewriting of a contractual obligation.<sup>2</sup> Here again, it may be asked whether it would not have sufficed simply to hold that the Mandatory, being in breach of its own obligations, could no longer claim the integral observance of the terms or limitations of the Mandate on the part of the Supervisory Authority.

## (2) *Jus posteriori jus priori derogat*

In the *Guardianship of Infants*, the facts of which in relation to the point about *ordre public* have been stated earlier (see § 1 (1) (b) above), Judge Moreno Quintana enunciated the *jus posteriori* principle in the following passage (*I.C.J.*, 1958, p. 107):

'*Ordre public* is indissolubly bound up with the general principles of law recognized by civilized nations which, under Article 38, paragraph 1 (c) of the Statute, the Court is required to apply as a main source of law in discharging its function of deciding in accordance with international law such disputes as are submitted to it. This means that the application of these principles is the subject of an international undertaking by all Members of the United Nations and by those States which have adhered to the Statute of the Court. *Jus posteriori derogat priori* says the well-known Roman maxim in accordance with which Article 103 of the Charter of the United Nations prescribes

<sup>1</sup> This, of course, counts as 'consideration' or '*causa*' under the systems of law which require the existence of this for the validity of certain types of contracts.

<sup>2</sup> As already pointed out on p. 220, n. 3, the Court's finding did not involve the same difficulty, since the Court in effect held such a liability to be already implicit in the Mandatory undertaking of South Africa.

that in the event of a conflict between the obligations imposed on Member-States by the Charter and obligations arising from any other international agreement, it is the former obligations that shall prevail. The national *ordre public* of Sweden consequently prevails over the provisions of the 1902 Convention which governs the guardianship of infants as between that country and the Netherlands. Moreover, none of the provisions of that Convention, and none of the opinions expressed in the course of the preparatory work for it justify the view that the application of the principle of *ordre public* was excluded.'

While the *jus posteriori* principle, enunciated by Judge Moreno Quintana in this passage admits, as such, of no doubt, the particular application of it here made or suggested calls for some comment:

(a) When Judge Moreno Quintana said that the application of the general principles of law recognized by paragraph 1 (c) of Article 38 of the Statute of the Court was 'the subject of an international undertaking by all members of the United Nations and by all those States which have adhered to the Statute of the Court', he presumably meant simply, or primarily, that by their adherence to the Statute (whether directly or *via* their membership of the United Nations), the States concerned had agreed to the application *by the Court* of these principles as one of the elements to be taken into account in deciding any dispute between them that might come before the Court. To say that these States had thereby impliedly undertaken *themselves* to apply these principles in their interstatal relations would be to go a step further. Such an inference could perhaps be drawn, but, for the reasons given in sub-paragraph (b) below would appear to be inappropriate.

(b) It would seem that paragraph 1 of Article 38 of the Statute, taken as a whole and including therefore head (c), must be regarded as declaratory of an existing legal position and not as involving any innovation. The whole paragraph is governed by the preambular passage according to which it is the 'function' of the Court 'to decide *in accordance with international law* such disputes as are submitted to it'. The various heads (a) to (d) which then follow are clearly listed as containing the elements which the Court 'shall apply' in deciding 'in accordance with international law'. As the Statute of the Court could clearly not have been intended to legislate *de novo* as to the substantive content of international law, it must be assumed that Article 38 was intended to recite or place on record only those elements which, under existing international law, were already material to any decision purporting to be given 'in accordance with international law'. This was indubitably true of heads (a), (b) and (d) of paragraph 1 (treaties and conventions; customary law; judicial decisions and juridical treatises), which had for long been applied or utilized by international tribunals; and, if only by the application of the *ejusdem generis* rule, the same would be



true of head (c) also. It cannot be supposed that the Statute was attempting, side by side with these well-known elements, obliquely to inject something totally new and untried. On the contrary, there is ample evidence<sup>1</sup> that the 'general principles of law recognized by civilized nations' had long been applied in interstate practice and by international tribunals, and have been the foundation of many well-known specific rules of international law.

(c) It has seemed desirable to stress this position because of its bearing on the sentence towards the end of Judge Moreno Quintana's above quoted remarks, where he says that 'The national *ordre public* of Sweden consequently prevails over the provisions of the 1902 Convention which governs the guardianship of infants as between that country and the Netherlands'. Judge Moreno Quintana used the word 'consequently' because presumably in his view, the exception of *ordre public* was (1) a general principle of law; and (2), as such, a recent one, i.e. a *jus posteriori* instituted since the 1902 Convention by Article 38 of the Statute. Both conclusions seem open to question on a number of grounds:

(i) To begin with, it is probably only in a very qualified sense that the *exceptio ordinis publici* can be regarded as a truly general principle of law at all. This is a matter that will be dealt with in a later article,<sup>2</sup> but it may be briefly stated here that the exception operates largely as a rule of *treaty* law, involving a condition to be read primarily into treaties on private international or conflict law subjects.<sup>3</sup> In so far as it has any application in other treaty cases, it is still confined to the same basic field of private international law matters.<sup>4</sup> Considered as a general principle of universal application, it would afford plausible ground for non-compliance with almost any public international law obligation, and would therefore, regarded as a generally applicable ground of exception to international legal obligations, be quite unacceptable.

(ii) Next, if what has been said under sub-paragraph (b) above is correct, even if the *ordre public* exception is—despite the doubts just expressed—to be regarded as a general principle of law within the meaning of Article 38 1 (c) of the Statute, it could not, on the basis of Article 38 1 (c), be regarded as in fact being a *jus posteriori* to a Convention such as the Swedish-Netherlands Convention of 1902—for, as has already been suggested, Article 38 contained nothing new, and merely listed, as material to a legal determination by the Court, elements which were in existence

<sup>1</sup> See, for instance, such a work as Sir Hersch Lauterpacht's *Private Law Sources and Analogies of International Law* (Longmans, 1927), *passim*.

<sup>2</sup> i.e. on treaty points arising during the 1954-9 period now under review.

<sup>3</sup> See the present writer's Fourth Report on the Law of Treaties (above, p. 217, n. 5), on 'The Effect of Treaties', in the *Yearbook of the International Law Commission* (1959), vol. 2.

<sup>4</sup> In this field it is clearly related to the analogous and fairly frequent question of how far one country will enforce through its courts certain types of laws of other countries, and judicial decisions based upon them.

and applicable to arbitral or judicial determinations generally, even before 1902, and much earlier.

(iii) Finally, even if the *ordre public* exception is to be regarded as a universal general principle of law *and*, by virtue of Article 38 1 (c) of the Statute, a *jus posteriori* to a treaty concluded in 1902, it would not at all follow that it therefore *ipso facto* superseded or overrode the treaty. On the contrary, it is in this respect that one of the main limitations on the application of the *jus posteriori* principle becomes immediately relevant—a limitation imposed by the application of the equally valid principle, *generalia specialibus non derogant*. The rules of customary international law are general rules (*generalia*), and even if they have come into existence at a later date, it is not the case that, merely because of their subsequent creation, they can derogate from the specific provisions of already existing particular treaties (*specialia*), even if such treaties relate to the same subject. Whether the parties will wish to terminate or revise their treaty in the light of the later general rule is another matter: but it is well established that, provided no contravention of any rule of general international law in the nature of *jus cogens* is involved, two or more States are entitled by treaty, purely for application *inter se* (though not of course as against third parties) to vary the *jus dispositivum*, and to apply in their own particular relations rules, or a system, differing from that prevailing under the general law.<sup>1</sup> This they can do in relation to already existing customary law; and *a fortiori*, subsequently emerging customary law does not *ipso facto* nullify existing treaties. It follows that if a treaty between two States is already in existence governing a certain matter, its operative force is not in any way affected merely by the emergence of a new general rule of law on the same subject; for the existence of a general rule on a subject (unless in the nature of *jus cogens*) is perfectly consistent with its non-application, or with a different application, as between two or more States who by treaty have specially so agreed.<sup>2</sup>

(iv) All this is of course implicitly recognized by paragraph 1 of Article 38 itself; for if by head (c) of paragraph 1 the Court was, in the *Guardianship of Infants* case (as in every case coming before it), directed to apply the general principles of law recognized by civilized nations, it was equally by head (a) of the same paragraph directed to apply 'international conventions, whether general or particular, establishing rules expressly recognised by the

<sup>1</sup> See as to this the present writer's Third Report on the Law of Treaties in the series cited above, p. 217, n. 5: 'The Essential Validity of Treaties', in the *Yearbook of the International Law Commission for 1958*, vol. 2, at pp. 27 and 40-41.

<sup>2</sup> These remarks naturally apply only to the case of a 'conflict' between a given treaty provision and a customary rule of law. Where a general rule of law is or becomes established by or through a general multilateral convention, the matter may become one of a conflict between two sets of treaty provisions, and as between countries parties to both sets, the *jus posteriori* rule will in principle apply—see further under (d) below.

contesting States'—i.e. to apply that very convention of 1902 which was in issue in the case. Moreover paragraph 1 of Article 38 in no way suggests that head (c) is to prevail over head (a), which the *generalia* principle would clearly prevent unless the contrary were expressly provided for. Furthermore, another head of paragraph 1, head (b), directs the application, equally, of customary international law, and the *generalia* principle is of course part of customary international law which, as stated above, recognizes the right of States by treaty to 'contract-out' of its general rules provided these rules are not in the nature of *jus cogens*, and the contracting-out process is not applied *vis-à-vis* third States not parties to the treaty concerned. It follows that if the *ordre public* exception was applicable to the 1902 Convention (and the present writer himself thinks it was), this must nevertheless have been for other reasons than those advanced by Judge Moreno Quintana. These other reasons will be discussed in a later article dealing with the more specifically treaty aspects of the Court's work during the period now under review.

(d) The remarks made by Judge Moreno Quintana about Article 103 of the Charter in the same passage, as above quoted, also call for some comment. It is necessary in the first place to be quite clear as to what is meant by, and what is the real effect of the *jus posteriori* rule in its application to the case of *treaties*. It is one thing to say that a later general law supersedes (or, in the event of conflict, prevails over) an earlier one on the same topic; but it is quite another to say that a later treaty (or particular treaty obligation) necessarily prevails over or supersedes an earlier treaty (or particular treaty obligation). Broadly speaking—there may sometimes be certain exceptions, but the matter is complex<sup>1</sup>—it does so only if, or in so far as, the two sets of provisions are clearly inconsistent, and only if the parties to the two treaties are identical; or alternatively it does so only as between those parties to the earlier treaty which are also parties to the later one. If this is not the case, a much more complex situation results which cannot be gone into here (the present writer has considered it in some detail elsewhere);<sup>2</sup> but in general the *jus posteriori* principle does not apply in such cases. The later treaty is simply *res inter alios acta*, in respect of States not parties to both, and no later *jus*, affecting them, exists.

(3) *Nemo in re sua (in sua propria causa) judex esse potest.*

(a) *Fundamental character of this principle.* In the *South-West Africa Voting Procedure* case, one of the questions involved was whether the application of the normal United Nations Assembly voting rules to South-West Africa matters would be consistent with the conditions laid down by

<sup>1</sup> See the present writer's 'Third Report on the Law of Treaties', above, p. 224, n. 1, at pp. 27 and 41-45.

<sup>2</sup> See *ibid.*



the Court in its main (1950) South-West Africa Opinion, namely that in exercising its supervisory functions in respect of the Mandate for South-West Africa, the United Nations Assembly should 'as far as possible' adhere to League procedure—the point being that the League took its substantive decisions on Mandates questions on the basis of a unanimity rule (including the vote of the Mandatory Power), whereas the United Nations Assembly never applied such a rule in the ordinary course of its work, and, in accordance with Article 18 of the Charter, took its decisions on the basis of a majority rule (either a simple or a two-thirds majority depending on the type of question involved).<sup>1</sup> The finding of the Court to the effect that the Assembly could, despite the League unanimity rule, apply its own *normal* voting rules to the case will be considered in a later article.<sup>2</sup> Sir Hersch Lauterpacht, whose views did not entirely coincide with those of the Court, and who evidently thought (see § 5 (1) (a) above) that taken purely in itself the application of a majority voting system must be more onerous for the Mandatory Power than a unanimity rule, nevertheless came to the same final conclusion as the Court on independent grounds. One of these (the merits of which will be considered in a later article)<sup>3</sup> was that the League did not in fact apply a strict or absolute unanimity rule. Or perhaps it would be more accurate to say that just as in applying its normal majority voting rule, the United Nations Assembly could reach a decision contrary to the views and vote of the Mandatory, so also, in Sir Hersch Lauterpacht's opinion, could the League Council have contrived to do, despite the nominal unanimity rule. He considered that in its actual practice the League fairly constantly found means of circumventing the unanimity principle.<sup>4</sup> In reaching these conclusions, Sir Hersch was much influenced by the view that, as far as the vote of the Mandatory Power was concerned, the League Council was entitled and indeed bound to apply the *nemo in re sua judex esse potest* principle, which he regarded as a principle of wide general application, not confined to strictly judicial proceedings. He said (*I.C.J.*, 1955, pp. 98–99):

'Admittedly, the procedure of the Council of the League of Nations was governed by the principle of unanimity not only of the Members of the Council but of States who, though not ordinarily Members thereof, were invited to sit at its table in connection with a matter under its consideration—a rule which applied also to the representatives of the Mandatory State invited to take part in the proceedings of the Council.

<sup>1</sup> Clearly this also raised the other main issue involved, namely whether the second condition laid down by the Court in its Main (1950) Opinion would be complied with. This was that the supervision to be carried out by the United Nations should not be exercised in a manner more onerous for the Mandatory Power than under the League. This, of course, was precisely the consequence likely to flow from a voting rule making the adoption of a decision not concurred in by the Mandatory possible.

<sup>2</sup> On points of more specifically United Nations bearing and interest.

<sup>3</sup> See n. 2 above.

<sup>4</sup> See n. 1 above as to the more onerous effect for the Mandatory of any non-unanimity system.

However, having regard both to principle and practice, as I interpret them, the ruling of the Court given in its Twelfth Advisory Opinion on the *Interpretation of the Treaty of Lausanne*<sup>1</sup> must be held to apply also to the question with which the Court is now concerned. In that case, the Court held that the principle which was enshrined in Article 15 of the Covenant and which excluded the vote of the parties to the dispute from the requirement of unanimity as a condition of the validity of a recommendation made by the Council, was of general application in so far as it embodied the "well-known rule that no one can be judge in his own suit".

Continuing, Sir Hersch said (*ibid.*, p. 99):

'That "well-known rule", henceforth sanctioned by a pronouncement of the Permanent Court of International Justice, must be held to apply to the case in which an international organ, even when acting otherwise under the rule of unanimity, judges in a supervisory capacity the legal propriety of the conduct of a State administering an international mandate or trust. The supervisory organ may do so either directly by pronouncing a verdict upon the conformity of the action of the administering State with its international obligations or indirectly by calling upon it to adopt—or desist from—a certain line of action.'

So fundamental was this principle in Sir Hersch's view, that it must be assumed to be part of, and an *a priori* qualification to, the very rule of unanimity even where expressly laid down. Thus even 'the rigid wording of Article 5 of the [League] Covenant, which laid down that, unless expressly provided to the contrary, the rule of unanimity should obtain', must be read in that sense, for (*ibid.*, pp. 99-100)

'... in the absence of a clear provision to the contrary, that rule is in itself qualified by the principle laid down by the Permanent Court of International Justice in the Advisory Opinion on the *Interpretation of the Treaty of Lausanne*. In that Opinion the Court considered this rule to be of general application for the decisions of the Council when acting in a judicial or arbitral capacity.'

In further elaboration of this view Sir Hersch Lauterpacht later (*ibid.*, pp. 104-5) said:

'There is . . . no conclusive factor which is apt to override the basic legal considerations to which I have referred above, namely, that in an instrument such as the Covenant of the League of Nations the general requirement of unanimity is not in itself sufficient to displace the principle that a party cannot be judge in its own case; that the requirement of unanimity, however expressly stated, is implicitly qualified by the latter principle; and that nothing short of its express exclusion is sufficient to justify a State in insisting that it should, by acting as judge in its own case, possess the right to render inoperative a solemn international obligation to which it has subscribed. This principle ought to be kept prominently in mind when it is a question of the supervised State claiming the right to frustrate by its own vote the legal efficacy of the supervision. The effectiveness of international obligations may not be the only governing consideration in the interpretation of treaties seeing that the parties occasionally intend to render them less effective than is indicated by their apparent purpose. But it is a consideration

<sup>1</sup> *P.C.I.J. Reports*, Series B, No. 12, p. 32. This case is also variously known as the *Turkey and Iraq Frontier* case, and the *Mosul Boundary* case.

which cannot be ignored. In so far as the principle *nemo judex in re sua* is not only a general principle of law, expressly sanctioned by the Court,<sup>1</sup> but also a principle of good faith, it is particularly appropriate in relation to an instrument of a fiduciary character such as a mandate or a trust in which equitable considerations acting upon the conscience are of compelling application. This, too, is a general principle of law recognized by civilized States. There is therefore no sufficient reason for assuming that if the Permanent Court of International Justice had been called upon to apply its ruling in the Twelfth Advisory Opinion to the question of unanimity in connection with the supervisory function of the Council in the matter of mandates, it would have abandoned the principle there enunciated.'

According to this view therefore, if the parties are to have a right to participate in the decision, this must be expressly provided for: it will not result simply from a provision to the effect that decisions are to be taken by unanimity. This does not of course mean that the right for a party to a dispute to participate in a decision about it may not be reserved on the basis of a clear inference. Thus Article 27, paragraph 3, of the Charter, after specifying that decisions of the Security Council on non-procedural matters are to be taken by an affirmative vote of seven members, including the concurring votes of the permanent members, adds a proviso to the effect that 'in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting'. It is a necessary inference from this that the disability does not apply (i) to decisions of the Council taken under other Chapters or provisions of the Charter, (ii) to decisions taken even under Chapter VI, or paragraph 3 of Article 52, where what is before the Council is not a 'dispute' *stricto sensu* but a 'situation',<sup>2</sup> so that although the voting members may in general terms be an interested party, it is not a party to a dispute which, *as such*, is before the Council.

(b) *The principle nemo judex in re sua is applicable in non-judicial as well as in judicial proceedings.* It is this application of the principle which, although solidly based on the finding of the Permanent Court in the *Treaty of Lausanne (Mosul Boundary)* case,<sup>3</sup> has a certain novelty—for if in international judicial proceedings it goes almost without saying that no country can be judge in its own cause, this is far from being so self-evident in other kinds

<sup>1</sup> i.e. the Permanent Court in the *Treaty of Lausanne* case (see p. 227, n. 1 above).

<sup>2</sup> Under Articles 34 and 35 of the Charter, the Security Council may be seised not only of actual disputes but of 'situations' which 'might lead to international friction or give rise to a dispute'.

<sup>3</sup> See p. 227, n. 1 above. Though perhaps the notion is not wholly unknown. Any court called upon to determine its own jurisdiction is in a certain sense judge in its own cause. Then there is the case of litigations between the subject and the State or Crown in countries where the judiciary constitutes a State service—or where, as in England, the Judge sitting in his court represents the actual presence of the Sovereign. The impartiality of the judiciary as between State and subject is not in question, but a slightly equivocal position may none the less sometimes arise. The entire administration of any system of *administrative* law necessarily has this characteristic; and the same thing may be seen in England in the tax cases heard and determined judicially by the Commissioners of Inland Revenue themselves, though subject to appeal to the Courts.



of proceedings, where there may be sound political reasons for making the validity of a decision dependent on the concurrence of the very entities who are going to be affected by it.<sup>1</sup> The element of novelty involved was conceded by Sir Hersch Lauterpacht in the following passage from the same opinion (*I.C.J.*, 1955, p. 100):

‘It must be conceded that the application of the principle *nemo iudex in re sua* to what is in essence a controversy between the mandatory and the otherwise unanimous Council constitutes an extension of that principle as laid down by the Court. However, the extension is more apparent than real. For the reasons stated above, there does not seem to exist any solid ground for distinguishing between decisions taken in pursuance of the supervisory functions of an international organ and decisions of a judicial or arbitral nature such as that with which the Council of the League was confronted in the matter of the determination of the boundary between Turkey and Iraq. In all cases in which there is a difference of opinion, brought to the point of a formal discordant vote, between the supervisory organ and the administering authority as to the conformity of the conduct of the latter with its international obligations, such difference has the essential elements of a dispute as to the application of a binding international instrument. In any such controversy the principle that no one is judge in his own cause must be deemed to apply. To put it differently, there is no valid reason for distinguishing, in connection with the applicability of the principle that no one is judge in his own cause, between the judicial and the supervisory organs. Both administer, in different ways, a system of binding rules of conduct.’

This is of course correct if the phrase ‘the principle that no one is judge in his own cause’ is understood as if it read ‘the principle that in the absence of express provision or necessary inference to the contrary, no one is judge in his own cause’. The point is that international instruments do frequently and of set purpose make precisely the distinction referred to by Sir Hersch Lauterpacht, and, provided they do so unmistakably, must be given effect to accordingly.

## DIVISION B: SOURCES OF INTERNATIONAL LAW

### § 1. INTERNATIONAL CUSTOM

Previous pronouncements of the Court and of individual judges on this subject were noticed in earlier articles.<sup>2</sup> In his separate<sup>3</sup> opinion in the *Nottebohm* case (merits) Judge Klaestad recalled the pronouncement of the Court in the *Asylum* case (merits) in which the Court had cited Article 38 of the Statute ‘which refers to international custom as evidence of a general practice accepted as law’.<sup>4</sup> The Court said that it followed from

<sup>1</sup> All systems involving a veto necessarily have this characteristic.

<sup>2</sup> See this *Year Book* 27 (1950), pp. 17-18, and 30 (1953), pp. 67-69.

<sup>3</sup> It was also a dissenting opinion, but the dissent did not touch on what constituted proof of an international custom.

<sup>4</sup> See *per* the Court in the *Asylum* case (*I.C.J.*, 1950, pp. 276-7), and this *Year Book*, 27 (1950), pp. 17-18.

this that the party which relied on a custom must prove it to be 'established in such a manner that it has become binding on the other party', and that the rule consequently invoked 'is in accordance with a constant and uniform usage practised by the States in question. . . .'<sup>1</sup> Applying this, Judge Klaestad in the *Nottebohm* case (merits) said (*I.C.J.*, 1955, p. 30):

'When the Court, in the *Asylum* case, was confronted with a contention relating to an alleged right of a unilateral and definitive qualification of the offence committed by the refugee, it based itself on the principle of State sovereignty and held that a party which relies on a custom derogating from that principle must prove that the rule invoked is in accordance with a constant and uniform State practice accepted as law. The same method would seem to be applicable in the present case. Having to base oneself on the ground that questions of naturalization are in principle within the exclusive competence of States, one should, as in the *Asylum* case, enquire whether a rule derogating from that principle is established in such a manner that it has become binding on Liechtenstein. The Government of Guatemala would have to prove that such a custom is in accordance with a constant and uniform State practice "accepted as law" (Article 38, para. 1 (b) of the Court's Statute). But no evidence is produced by that Government purporting to establish the existence of such a custom.'

Judge Klaestad was of course here referring to the main Guatemalan contention (accepted by the Court, but Judge Klaestad, amongst others, dissenting) that the *Nottebohm* naturalization, however regular under Liechtenstein law, had no international effect as against Guatemala for the purpose of enabling Liechtenstein to support an international claim on behalf of Mr. *Nottebohm*, because of the absence of any sufficient concrete connexion between the person naturalized and the State of Liechtenstein. The substantive merits of this contention do not affect the issue of what is receivable under the head of international custom, and they will be considered elsewhere.<sup>2</sup>

## § 2. STATUS OR RÉGIME CREATING INTERNATIONAL INSTRUMENTS

Previous pronouncements of the Court and of individual judges on this subject have been considered in an earlier article;<sup>3</sup> and as the present writer has put forward views on various aspects of the matter elsewhere,<sup>4</sup> they will not be further developed here. However, an excellent statement of the essential difference between a treaty establishing a mere contractual relationship (depending wholly on the treaty concerned and its continued existence), and one setting up an international status or régime on a basis that causes it to take on an existence independent of that of the original treaty, was given during the period now under review by Sir Hersch Lauterpacht in the *Petitioners* case. Referring to the Mandates system, and conceding that it is, to say the least of it, not a normal part of the judicial

<sup>1</sup> See *ibid.*

<sup>2</sup> In the article in this series for 1960.

<sup>3</sup> See this *Year Book*, 27 (1950), pp. 8-10.

<sup>4</sup> See the relevant parts of the publications cited above, pp. 188, n. 5; 196, n. 1; 217, n. 5.

function for courts to re-write a contract,<sup>1</sup> he said (*I.C.J.*, 1956, pp. 48-49) that, however,

'... this is not a case of a contract or even of an ordinary treaty analogous to a contract. As already pointed out, this is a case of the operation and application of multilateral instruments, as interpreted by the Court in its Opinion of 11 July 1950, creating an international status—an international régime—transcending a mere contractual relation (*I.C.J. Reports* 1950, p. 132). The essence of such instruments is that their validity continues notwithstanding changes in the attitudes, or the status, or the very survival of individual parties or persons affected. Their continuing validity implies their continued operation and the resulting legitimacy of the means devised for that purpose by way of judicial interpretation and application of the original instrument. The unity and the operation of the régime created by them cannot be allowed to fail because of a breakdown or gap which may arise in consequence of an act of a party or otherwise. Thus viewed, the issue before the Court is potentially of wider import than the problem which has provided the occasion for the present Advisory Opinion. It is just because the régime established by them constitutes a unity that, in relation to instruments of this nature, the law—the existing law as judicially interpreted—finds means for removing a clog or filling a lacuna or adopting an alternative device in order to prevent a standstill of the entire system on account of a failure in any particular link or part. This is unlike the case of a breach of the provisions of an ordinary treaty—which breach creates, as a rule, a right for the injured party to denounce it and to claim damages. It is instructive in this connection that with regard to general texts of a law-making character or those providing for an international régime or administration the principle of separability of their provisions with a view to ensuring the continuous operation of the treaty as a whole has been increasingly recognized by international practice. The treaty as a whole does not terminate as the result of a breach of an individual clause. Neither is it necessarily rendered impotent and inoperative as the result of the action or inaction of one of the parties. It continues in being subject to adaptation to circumstances which have arisen.'

It is not necessary to inquire here into the exact merits of all the deductions drawn by Sir Hersch Lauterpacht in this passage as resulting from the particular character of the status or régime-creating instrument. The point immediately relevant in the present connexion is that such instruments are in the material sense<sup>2</sup> sources of independent international law, and broadly for the reasons and through the processes indicated by this eminent Judge whose recent death constitutes a grave loss to the international legal community.

<sup>1</sup> 'What', asked Sir Hersch '... is the authority for the proposition that the Court may replace one means of supervision by another, not previously authorized—nay, expressly disallowed? This, it may be objected, is not the way in which courts normally proceed in the matter of contracts ...' (*I.C.J.*, 1956, 48).

It could be added that it was precisely the type of way in which the Court had itself refused to act in a rather analogous situation in the second phase of the *Peace Treaties* case (see this *Year Book*, 28 (1951), p. 24) when it had refused to substitute a different method of constituting an arbitral Commission from the one provided by the relevant treaty, even though it was by the default of one of the parties that the Commission could not be constituted as provided in the treaty.

<sup>2</sup> In his contribution to the *Symbolae Verzijl* (1958), ('Some Problems regarding the Formal Sources of International Law') the present writer suggested that general multilateral law-making treaties, although constituting important *material* sources of international law, were not in the strict sense *formal* sources of it, except for the actual parties.



## NOTES

### THE MODE OF CITATION OF INTERNATIONAL COURT DECISIONS<sup>1</sup>

THE *Reports of Judgments, Advisory Opinions and Orders* issued by the International Court of Justice have always been so well produced that it borders on sacrilege to utter any criticism of them, but they are of such central importance for the contemporary international lawyer that it may not be amiss to venture a suggestion for their further improvement.

The *Reports* prescribe a mode of citation for each judgment, advisory opinion and order. It is certainly desirable that there should be a uniform mode of citation of International Court decisions, but such a result can be effectively achieved by the existence of a prescribed mode of citation only if the prescribed mode is in fact a convenient one and is used in practice both by the Court and by others.

The mode of citation at present prescribed in the International Court of Justice reports is so cumbersome that little or no use of it is made in practice even by the Court itself; it therefore fails to achieve its intended purpose of facilitating, and promoting uniformity in, the citation of International Court decisions. A re-examination of the matter by the Court therefore seems desirable.

The prescribed mode of citation includes in each case both a standard part which is used with appropriate variants in all cases and a special part descriptive of the particular case.

Both the standard part and, in many cases, the special part are open to substantial criticism.

The following examples are illustrative of the standard part as used in varied contexts; the standard part of the formula is italicized in each case.

#### Prescribed Mode of Citation for a Judgment:

The *Minquiers and Ecrehos Case*, *Judgment of November 17th, 1953: I.C.J. Reports, 1953, p. 47.*

#### Prescribed Mode of Citation for a Judgment relating to Preliminary Objections:

Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), *Preliminary Objections, Judgment of May 26th, 1959: I.C.J. Reports, 1959, p. 127.*

#### Prescribed Mode of Citation for an Order relating to a request to Indicate Interim Measures of Protection:

Interhandel Case (*interim measures of protection*), *Order of October 24th, 1957: I.C.J. Reports, 1957, p. 105.*

#### Prescribed Mode of Citation for an Order in Contested Proceedings.

Case concerning the Barcelona Traction, Light and Power Company Limited, (Belgium v. Spain), *Order of October 18th, 1958: I.C.J. Reports, 1958, p. 49.*

#### Prescribed Mode of Citation for an Advisory Opinion:

Admissibility of Hearings of Petitioners by the Committee on South-West Africa, *Advisory Opinion of June 1st, 1956: I.C.J. Reports, 1956, p. 23.*

<sup>1</sup> © C. W. Jenks, 1960.

Prescribed Mode of Citation for an Order in Advisory Proceedings:

Effect of Awards of Compensation made by the U.N. Administrative Tribunal,  
*Order of January 14th, 1954: I.C.J. Reports, 1954, p. 4.*

At this stage we are concerned only with the standard or formal parts of these modes of citation; the appropriateness of the description of the particular cases will be considered later.

The term 'case' appears to be used in the prescribed mode of citation only in respect of judgments and orders made in the course of contested proceedings; it is not used in respect of advisory opinions or orders made in the course of advisory proceedings. In this respect the prescribed mode of citation differs from common usage and sometimes tends to make the citation unnecessarily cumbersome.

The prescribed mode of citation includes the description 'judgment', 'order' or 'advisory opinion' as may be appropriate, together with the full date. If the specification 'judgment', or 'advisory opinion' is necessary, and it would not seem indispensable in a mode of citation which is essentially a convenient shorthand, it would seem possible to use the word 'judgment' in substitution for 'case' rather than in addition to it and to use the word 'opinion' without 'advisory' in the same manner as an integral part of the title rather than as explanatory addition to it. The full date is in any case surely unnecessary; there may be a balance of advantage in retaining the year in the prescribed mode of citation, in accordance with the usual practice in respect of the short titles of statutes and international conventions, but no one can reasonably be expected to charge his memory with the precise dates of particular judgments or opinions or to verify them whenever referring to a case and references to orders (in respect of which alone there is any real danger of confusion between different orders made during the same year) must be extremely rare except in the pleadings in the particular case. The year is, however, a necessary part of the reference to the reports; it therefore seems unnecessary that it should invariably be repeated twice in the prescribed mode of citation, first as part of the full date and then as part of the reference to the reports.

The prescribed mode of citation for each case concludes with the reference *I.C.J. Reports* followed by the year and page number. Why is the word 'Reports' necessary? In any document containing frequent references to the *I.C.J. Reports* it may be necessary to repeat it scores or even hundreds of times, and it is for this reason not infrequently omitted in common usage. Would it not suffice to say, for instance, *Interhandel Case, 1959, I.C.J. 6*, and if this is sufficient, should not the mode of citation prescribed in the publications of the Court give a lead in the matter?

The mode of citation for judgments upon preliminary objections also appears to be unnecessarily cumbersome. Judgments on preliminary objections by the Permanent Court of International Justice, which had no prescribed mode of citation, are frequently cited in the simple form: *Mavrommatis Palestine Concessions (Jurisdiction) Case*. Subsequently it appears to have become the practice of the Permanent Court to include the term 'preliminary objection' in the titles of such cases and the same practice has been followed in the mode of citation prescribed for International Court decisions (but not entirely consistently as the prescribed modes of citation for the *Ambatielos* and *Anglo-Iranian* cases are *Ambatielos Case (Jurisdiction), Judgment of July 1st, 1952, I.C.J. Reports, 1952, p. 28* and *Anglo-Iranian Oil Co. Case (Jurisdiction), Judgment of July 22nd, 1952: I.C.J. Reports, 1952, p. 93* respectively, and the term is sometimes omitted entirely when nothing remains before the Court for judgment on the merits when it has given a decision on the preliminary objections, e.g. the *Interhandel Case*).

The term 'jurisdiction' is a far simpler and more convenient shorthand than the term 'preliminary objection'. It may not always be as technically satisfactory; there may be preliminary objections which do not technically raise a question of jurisdiction, and questions of jurisdiction may arise otherwise than in connexion with a preliminary objection; they arise, for instance, whenever a preliminary objection is joined to the merits. But a mode of citation is essentially a practical convenience and as a practical matter it is surely both sufficiently accurate and far more convenient to say *Corfu Channel (Jurisdiction) Case*, 1948, *I.C.J.* 15 rather than *Corfu Channel Case, Judgment on Preliminary Objection*, *I.C.J. Reports*, 1948, p. 15.

The mode of citation for orders relating to requests for the indication of interim measures of protection could likewise be usefully simplified in the same manner. Why should it not suffice to say: *Interhandel (Interim Protection) Case*, 1957, *I.C.J.* 105 rather than *Interhandel Case (Interim Measures of Protection), Order of October 24th, 1957: I.C.J. Reports, 1957, p. 105*? The shorter formula would cover equally well both cases in which the Court indicates interim measures of protection and cases in which it declines to do so.

Whatever may be thought of these various suggestions for simplifying the standard or formal parts of the prescribed mode of citation, there can be little room for doubt that the identification of particular cases at present leaves much to be desired. The purpose of a prescribed mode of citation is to facilitate citation. In order to fulfil this purpose two simple principles should be observed. First, everything superfluous should be omitted from the mode of citation so that it becomes as concise as possible. Secondly, the mode of citation should always be as distinctive as possible; for this reason the common lawyer's device of identifying a case by the names of the parties is generally inappropriate in international proceedings in which many of the same parties constantly recur in successive cases.

The following are illustrations of the prescribed modes of citation indicated in the reports for certain recent cases:

Judgments of the Administrative Tribunal of the I.L.O. upon Complaints made against the U.N.E.S.C.O., Advisory Opinion of October 23rd, 1956: *I.C.J. Reports*, 1956, p. 77.

Case of Certain Norwegian Loans, Judgment of July 6th, 1957: *I.C.J. Reports*, 1957, p. 9.

Case concerning Rights of Passage over Indian Territory, (Preliminary Objections), Judgment of November 26th 1957: *I.C.J. Reports*, 1957, p. 125.

Case concerning the Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden), Judgment of November 28th, 1958: *I.C.J. Reports*, 1958, p. 55.

Case concerning the Aerial Incident of July 27th, 1955, (Israel v. Bulgaria), Preliminary Objections, Judgment of May 26th, 1959: *I.C.J. Reports*, 1959, p. 127.

Case concerning Sovereignty over Certain Frontier Land, Judgment of 20 June 1959: *I.C.J. Reports*, 1959, p. 209.

All of these titles contain unnecessary verbiage and some of them conspicuously fail to identify the subject-matter of the case.

It ought to be a matter for consideration whether these cases ought not to be cited, more simply and conveniently, somewhat as follows:

*Complaints against U.N.E.S.C.O. Case*, 1956, *I.C.J.* 77.



*Norwegian Loans Case*, 1957, *I.C.J.* 9.

*Right of Passage (Jurisdiction) Case*, 1957, *I.C.J.* 125.

*Marie Elisabeth Boll Case*, 1958, *I.C.J.* 55.

*Israel/Bulgaria Aerial Incident (Jurisdiction) Case*, 1959, *I.C.J.* 127.

*Frontier Land Case*, 1959, *I.C.J.* 209 (or perhaps even more appropriately *Zonder-eygen Case*, 1959, *I.C.J.* 209).

These names, or names somewhat like them, are those by which the cases will most probably be known in practice.

There is at least one case in which the prescribed mode of citation errs in the opposite direction. The *Fisheries Case*,<sup>1</sup> to use the prescribed mode of citation of the final judgment of the Court, is almost invariably known as the *Anglo-Norwegian Fisheries Case* or the *Norwegian Fisheries Case*, and this degree of particularization appears to be necessary in view of the number of international decisions and awards relating to fisheries matters and the prospect of further fisheries cases. It is not clear why the title *Anglo-Norwegian Fisheries Case* used in earlier orders in this case was abandoned; it is not likely that it was thought to contain any implication that the fisheries rather than the case were Anglo-Norwegian!

It is, of course, appreciated that abbreviating a mode of citation necessarily involves omitting something, and possibly omitting something which someone regards as important. It is also appreciated that, while a case is pending, it may be important that the mode of citation should not appear to prejudice either the result of the case or the relative importance of different elements in the case. But these are not insuperable difficulties. Proper and place names will frequently identify a case more clearly, and in a manner which cannot prejudice any of the issues involved, than a cumbersome reference to the issues of law raised by the case or to the treaty or arbitral award in connexion with which these issues have arisen.

The number of international cases cited in international legal proceedings and in works on international law is constantly increasing. It seems, therefore, appropriate to develop a succinct mode of citation which is sufficiently businesslike to command general acceptance. It is reasonable to hope that the International Court of Justice, which is in a unique position to do so, will give a firm lead in the matter.

C. WILFRED JENKS

## THE IMMUNITY OF EMBASSY PREMISES<sup>2</sup>

THE general immunity of embassy buildings has been the subject of many decisions of national and international courts. Some of these decisions deal with the inception of the immunity and state that the purchase of real property does not *ipso facto* invest the property with the privileges of extraterritoriality but that it is necessary for the property to be completely appropriated to the services of the embassy (see *Petrocchino v. The Swedish State*, *Annual Digest*, 1929-30, Case No. 198, and Lauterpacht, 'The Problem of Jurisdictional Immunities of Foreign States', in this *Year Book*, 28 (1951), p. 220). Oddly enough, however, it is only recently that the courts have dealt with the termination of the protection of embassy premises. For that reason four decisions of the Supreme Restitution Court for Berlin on this question are of considerable interest.

The Supreme Restitution Court was established by the Allied Kommandatura in Berlin in July 1953 (Law No. 25, *Allied Kommandatura Gazette*, No. 47, p. 750) and is

<sup>1</sup> *I.C.J. Reports*, 1951, p. 116.

<sup>2</sup> © H. P. Romberg, 1960.

composed of seven members. The American, the British and the French Commandants each appointed one Justice, the Senate of Berlin appointed three Justices and the neutral President was appointed by the Allied Kommandatura and the Senate jointly. The Supreme Court deals with the restitution of identifiable property to persons who were unjustly deprived of such property between 30 January 1933 and 8 May 1945 for reasons of race, religion, nationality or political opposition to National Socialism.

All the four decisions involve real property located in West Berlin which was owned before 1933 by persons persecuted under the National Socialist régime who had to sell their property under duress and now claim it back. In all four cases the property was bought by foreign governments. In three of the cases the building situated on the property was used as an embassy but was totally destroyed in 1945 as a result of war action and has not been rebuilt. In the fourth case the building was used as the office of the Naval Attaché until the end of the war. It has not been destroyed, but after the war it was rented to private tenants and came under the control of a trustee. In all four appeals the leading issue was whether the defendant State could claim diplomatic immunity although the properties had not been used as embassies since 1945.

In the three similar appeals where the building had been destroyed the Court dealt first with the general rules of International Law as to real property owned by a foreign sovereign. It came to the conclusion that even when a foreign sovereign is the present owner of the real property and even when he asserts the immunity, there is not in existence (and certainly not in Germany) any generally accepted rule of International Law which prevents a court either from hearing or from passing upon the merits of a claim which, if sustained, may adversely affect the legal ownership of the real property.

The Court then dealt specially with the immunity of embassy and legation buildings, rejecting the old theory of extraterritoriality and adopting the principle of functional necessity as the basis of immunity. The position taken by the Court can best be shown by the following extract from the opinion in the appeal in which the People's Republic of Bulgaria was the defendant-appellant (*Tietz v. People's Republic of Bulgaria*, File No. ORG/A/1266):

'It is our considered opinion that no rule or practical usage of International Law is better settled than the rule—at least, of convenience and, sometimes, of law—or usage which is expressed concisely in the maxim *ne impediatur legatio*.

'It is universally acknowledged that not only an ambassador or a minister but also the members of a legation or embassy possess a special and extraordinary public character which makes it more than convenient—indeed, it is indispensable—that, in order to transact the business and the great affairs of the sending and receiving States, they shall enjoy a very extensive personal immunity from the local jurisdiction of the country to which they are accredited, so as not to be impeded in the performance of their important diplomatic functions and duties.

'It is only because of these important public (yet personal) human necessities which affect the conduct of diplomacy and of international relations that the buildings and the precincts of an embassy enjoy their traditional nexus of special privileges and immunities. These privileges and immunities of the buildings and the real property on which the buildings stand are in reality no more than an inanimate reflection of the necessary public privileges and immunities of the persons who embody the mission, and who constitute the embassy staff, and these privileges and immunities were created and exist and are designed to be applicable in order to ensure to the mission the peace of mind and the tranquillity, together with the sense of security and confidence, which are so indispensable in permitting the persons who are members of an embassy or legation staff to perform their great public duties to the best of their personal capacities, without being interfered with or impeded in any way whatever, no matter how slight, by local disturbances

or difficulties or by the possibility of the existence of local disturbances or difficulties.

'It is indisputably a rule of law in all civilized countries that the individual persons who are called diplomats must necessarily enjoy many special privileges and extensive immunities, and that they are entitled to receive from the local sovereign a very high degree of personal protection of their peace. When, however, these privileges and immunities and this special protection of their peace were further extended by a general civilized usage so as to embrace the embassy buildings and the embassy precincts within this protected sphere of peace it seems to be generally agreed that this further extension originally arose, not because of any newly created rule of law, whether domestic or international, but upon the basis of a long standing and customary reciprocal sense of courtesy or general convenience, which is often referred to for short as comity, and which domestic administrative persons, the officials of the domestic Foreign Office or Department of State, in accordance with the reciprocal extension of such courtesies to their own diplomatic premises by the governments of other States, granted to the embassy buildings used by foreign States to house their diplomatic representatives.

'Although it began in the sphere of reciprocal courtesy the custom or usage of comity has existed for so long that today it may be deemed to have attained to the status of a rule of International Law. It was so treated by the Research in International Law of Harvard Law School, which was published in 1932. The Harvard Research was frequently referred to during the subsequent work of the International Law Commission of the United Nations, which in 1957 submitted its own draft articles on diplomatic intercourse and immunities to those nations, and which in 1958 revised its 1957 draft after receiving and considering the views of the twenty-one nations which thought it useful or necessary to reply.

'The International Law Commission likewise deemed that the matter of diplomatic privileges and immunities had risen to the level of a rule of International Law. It rejected the older theory of extraterritoriality, and adopted the theory of "functional necessity"—while also bearing in mind the representative character of the head of the mission *and* of the mission itself.

'The modern theory of functional necessity as expounded by the Commission is in accordance with what this Court has stated above. As applied to the circumstances of the present case the Commission said in its Commentary (*American Journal of International Law*, January, 1959; Volume 53, at page 268):

'“(4) The inviolability of the mission premises is not the consequence of the inviolability of the head of the mission, but is an attribute of the sending state by reason of the *fact* that the premises are *used* as the headquarters of the mission.’

'In other words, the *fact of use as mission premises* is the basis of the immunity of real property, because, as the Commission took pains to observe at the same point:

'“\*it should on the other hand be remembered that real property is subject to the laws of the country in which it is situated”.

'It is more than implicit in what has been said above, and it is in fact true, that a foreign ambassador or minister and his staff also possess the representative capacity: that is, they represent the foreign sovereign in all of the business and affairs which he transacts with the local sovereign. Save in exceptional instances these affairs must necessarily and normally be transacted at the place where the local sovereign has his capitol, and it is there at that place that a foreign sovereign must necessarily and normally locate his embassy or legation buildings in order to facilitate the conduct of affairs. Indeed the local sovereign would be well warranted in objecting to the action of a foreign sovereign if the latter were to locate his embassy at some place so remotely and unreasonably distant from the local capitol as to delay seriously the necessary conduct of foreign affairs from day to day and, at occasional times, from hour to hour.

'It follows from this requirement not only that the embassy buildings of a foreign sovereign must normally be located at, or very close to, the operative capitol of the local



sovereign, but it also follows therefrom that the usage of comity, which affords a measure of immunity to the embassy buildings used by a foreign sovereign, is reasonably—and functionally—intended—having regard to the facilitation of the conduct of international affairs—to extend only to those foreign embassy buildings which are located at or close to the local capitol, and whence each foreign sovereign conducts his affairs with the local sovereign by means of his own embassy staff. Bearing in mind the rationale for the usage of comity, this functional usage need not extend to, and in fact under normal circumstances it does not extend to, other buildings owned or occupied by a foreign sovereign when those other buildings are not used for the function of transacting diplomatic business with the local sovereign, and can not so be used either because they are substantially and unreasonably remote from the local capitol, or for any other reason. We do not intend to exclude the special case, which likewise is not before us, of a building or buildings used by the ambassador or by his staff for recuperative or recreational or similar purposes. The conservation of the health of the ambassador and his staff is legitimately to be fostered because it facilitates the transaction of diplomatic business.

¶ ‘In the present case the affected property is located in West Berlin, where no diplomatic activities take place in the sense of relations between sending and receiving States through diplomatic envoys. Consequently nothing done at West Berlin could or would affect or disturb the tranquillity of the function—the work—to be performed by the Bulgarian diplomats. In other words, it is impossible to disturb the tranquillity of a non-existent function—the function of diplomatic relationship.

‘Furthermore, it should be noted that the affected property at West Berlin is now vacant land, the buildings on it having been totally destroyed in the course of the last war, so that the former embassy premises are now and for a long time in the past have been quite incapable of human habitation. Consequently the question can not arise and does not arise of any interference with, or disturbance of, any *use* made of the premises by Bulgaria for any function or for any purposes whatever, whether “public” or otherwise.

‘Therefore the protection of the rule of comity is not at all applicable to the devastated premises at Berlin. Even if we were to assume that the protection of this rule extended to uninhabitable and long abandoned ruins, which it does not, the rationale which underlies the rule would prevent its application to the Berlin property, which for fourteen years has not been *used*, and which at the present time cannot reasonably be *used* as an embassy or legation. *Cessante ratione legis cessat et ipsa lex*.

‘With reference to the time of the inception of the protection of this rule of immunity the Bulgarian brief acknowledges candidly that the Kammergericht [German Court of Appeal] was right when it held “that the mere *purchase* of real property for ambassadorial purposes did not suffice to found its extraterritoriality, but that [it] was founded only when the property was in fact used for diplomatic purposes”.

‘When referring to the time of the termination of the protection of this rule of immunity the Bulgarian State’s brief is less precise. It acknowledges that there can be a termination of this protection by the substitution of other premises: for the rest, it states that “the *use* of real property as embassy premises [must be] *intentionally* terminated”.

‘There are circumstances under which the claim of intention as stated so broadly and so vaguely in the Bulgarian brief might well be significant, but there are also other circumstances—and we think that the present case embodies them—wherein the claim of intention would either not be legally decisive at all, or else would require a great deal of qualification and of limitation. Here, as at other places in this opinion, it is not necessary to consider the many ramifications of fact—or of intention—which might be possible, but which are not actually present in the case now before us. We shall confine ourselves to the facts and the circumstances of the present appeal.

‘When the Bulgarian brief asserts that the Bulgarian State did not intend to give up the use of the old embassy premises in West Berlin it may be that we should infer (by an expansion of this assertion) that Bulgaria wishes to argue that the existence of the immunity of the affected premises was not terminated by their destruction and disuse for fourteen years, but that, instead, the immunity of these premises has only been suspended—

because of the legal force and effect of the alleged Bulgarian intention—until the time shall come when, in some future year, West Berlin again becomes an operative capitol, and when, in consequence thereof, the Bulgarian State rebuilds the destroyed embassy buildings upon the affected premises, transacts diplomatic affairs thereon and therefrom, and by this future functional use thus revives the long-suspended diplomatic immunity of the premises.

‘In the opinion of the Supreme Court the foregoing arguments are not sufficient to justify our agreement with the contention that the immunity of the affected premises, although “suspended” because of their long disuse, nevertheless still exists.

‘The special cases in which the doctrine of the suspension of the use of diplomatic premises invoked, and their immunity is sustained, involve two sets of circumstances.

‘The first special case is where there is war between the sending and the receiving sovereigns, and where it is clear that both sovereigns intend (albeit, perhaps, tacitly) to resume their temporarily interrupted diplomatic relationships upon the termination of the war.

‘The second special case is where, because of some dispute which is not of sufficient importance to be a *casus belli*, diplomatic relations between the sending and the receiving sovereigns are suspended. Here likewise it is clear that both sovereigns intend (again, perhaps, tacitly) to resume their temporarily interrupted diplomatic relationships upon the settlement of the dispute.

‘But in the case now before us there is not present either of these two special sets of circumstances in which, the cessation of the use of the premises for diplomatic purposes being known to be temporary, their immunity is, if ever “suspended” at all, soon fully revived because of the existing intention to resume their use for diplomatic purposes during a relatively near future.

‘As has been pointed out above, the rule of *ne impediatur legatio*, which is the foundation for the immunity of diplomatic premises, exists in order to facilitate the continuous conduct of established and existing diplomatic relationships between sovereigns. Consequently the extension of the protection of the ensuing immunity to any particular premises essentially involves questions of fact.

‘If this Court were to take into consideration such intentions as have here been urged upon us, we should be faced with the problem of taking into our consideration what is really the alleged existence of some future fact situated within the sphere of high politics. This Court cannot speculate upon the time when the possible outcome of future political events may take place. We must decide this appeal—not in the anticipation of speculative future facts—but in accordance with the facts which are in existence and are before us now.

‘In a case of the type which is now before us the decisive questions of fact involve the use of the buildings on the premises for the conduct of diplomatic affairs between sovereigns. It is the fact here that the buildings, although they were used many years ago for diplomatic purposes under quite different circumstances, have been destroyed, and that all use of them has ceased. It is likewise clear, under the circumstances of the present case, that no diplomatic activity whatever, in the sense of the conduct of diplomatic relations between a sending sovereign and a receiving sovereign, exists in West Berlin.

‘When, therefore, the use and the function of the premises has ceased—and ceased for a reason not truly and merely temporary—then their immunity must be considered as likewise having come to an end.’

In the two other appeals where the building had been destroyed the reasons given by the Supreme Court were almost identical (*Bennett v. People's Republic of Hungary*, File No. ORG/A/1625, and *Weinmann v. Republic of Latvia*, File No. ORG/A/1333).

In the fourth appeal (*Cassirer v. Japan*, File No. ORG/A/1896) the Supreme Court referred to the other cases but had to deal with slightly different facts and additional arguments. In this case the building was not used as an embassy but as an office of the

Japanese Naval Attaché. As the former German and Japanese Governments had agreed to a diplomatic exchange of Naval Attachés, the Court held that the diplomatic immunity had extended to the premises upon which the offices of the Naval Attaché were located. The Supreme Court also held that Article 14 of the Peace Treaty signed by the Allied Powers and Japan on 8 September 1951 had no relevance upon this appeal (this Article dealt with the transfer of real property owned by the Government of Japan and used for diplomatic purposes).

As already stated, the building involved in this appeal had not been destroyed. However, at the end of the war the Japanese Naval Attachés had had to leave Berlin and the building was then rented to private tenants and came under the control of a trustee. The Government of Japan represented that it was compelled to leave all of its Berlin premises in 1945; that it did not intend to terminate its diplomatic relations either with Germany or at Berlin; that it did not agree to the leasing of premises, and that it would like to move part of its embassy from Bonn into the affected building even before Berlin again became the capital of Germany and even if reunification could not be accomplished within the near future.

Nevertheless, the Supreme Court held that at the end of the Second World War and in connexion with the surrender to the allies, Japan had been obliged to terminate, and did in fact terminate all its diplomatic relationships with other sovereign states. As to the declared intention to use the premises for diplomatic purposes the Supreme Court said:

'The rationale of functional necessity makes it clear that the immunity of diplomatic premises exists because of their possession, coupled with their actual use, for diplomatic purposes. Absent the elements of possession and of actual use, a mere intention to use such premises for diplomatic purposes in the future, prior to their actual use, is of no legal significance upon the question of the resurrection of the privilege of immunity. Moreover, the attempt by counsel for Japan to employ this argument of intention to use, in order to remedy the deficiency of Japan's lack of possession of the intentionally disused premises, mistakes the real purpose which underlies and which justifies the existence of the rule of diplomatic immunity. Immunity is a shield, not a sword.'

In all four appeals therefore the Supreme Court dismissed the petitions of the governments for review of the restitution orders and denied the claim of diplomatic immunity with respect to the premises located in West Berlin which for one reason or another had ceased to be used for diplomatic purposes since 1945.<sup>1</sup>

H. P. ROMBERG

### THREE INTERNATIONAL COMMODITY AGREEMENTS

THE rebirth in 1959 of two of the world-wide commodity agreements may justify a note commenting on some of their features which are unusual or of general interest in the field of international law. The International Sugar Agreement of 1958,<sup>2</sup> replacing an earlier Agreement, was opened for signature on 1 December 1958; the International Wheat Agreement of 1959,<sup>3</sup> also replacing an earlier Agreement, was opened for signature on 6 April 1959. The third Agreement which is discussed in this note is the International Tin Agreement,<sup>4</sup> which was opened for signature on 1 March 1954,

<sup>1</sup> The English version of the decisions is the official text. Copies of the decisions and of a German translation can be obtained from the Registrar, Supreme Restitution Court for Berlin, 17 Rauchstrasse, Berlin W 35.

<sup>3</sup> Cmnd. 730: April 1959.

<sup>2</sup> Cmnd. 587: November 1958.

<sup>4</sup> Cmnd. 12: *Treaty Series*, No. 50 (1956).



and was intended originally to last for five years. In order to deal with these complicated Agreements within the compass of a note, and, as far as possible, together, considerable compression has been required and some qualifications necessary to complete accuracy have been omitted when they do not affect the substance of the points made.

This *Year Book* is not the place for a discussion of the substance of these Agreements, since they are of a highly technical character. The primary aim of all three is to keep stable the prices of the commodities which they cover, but this is done in three different ways which may be briefly described. The International Sugar Agreement imposes restrictions on the production and export of sugar, which become increasingly severe as the price falls: in return, each importing country agrees not to increase its purchases of sugar from countries not parties to the Agreement. The International Wheat Agreement embodies an undertaking by importing members that they will import a specified percentage of their needs from the exporting members at prices within the agreed range; this is balanced by the undertaking given by the exporting members that they will sell wheat to importing members, at a price not higher than the maximum limit of the agreed range, to the full quantity purchased in previous years. The International Tin Agreement establishes a 'buffer stock' of tin and a fund of money; when the price of tin is high, the tin is sold by the Council; when it is low, tin is bought by the Council; in this way the market is stabilized.

Multilateral agreements concerning specific commodities and the principles which should govern their drafting were regulated by the Havana Charter<sup>1</sup> establishing the International Trade Organization. The Havana Charter never entered into force, but, in relation to commodity agreements, though stillborn, it rules the world from its grave. Chapter VI of the Charter lays down certain principles, and a commodity agreement must comply with these if the restrictions and discrimination contained in it are to be regarded as consistent with the General Agreement on Tariffs and Trade.<sup>2</sup> In this note it is, therefore, frequently necessary to refer to the provisions of the Havana Charter.

Each of the three Agreements under consideration sets up a Council to give effect to the Agreement. By an unfortunate confusion of drafting, which occurs in all three Agreements, both the International Organization of which the governments are members, and the supreme organ of that organization are called the Council. Since, in order to accord with the Havana Charter, commodity agreements must not be made for more than five years and any renewal shall be for a period not exceeding five years, the original Agreements which created the International Sugar Council and the International Wheat Council have expired; but the subsequent Agreements in each case have been carefully drafted to perpetuate the legal personality of the Council. Thus, Article 27 (1) of the International Sugar Agreement of 1958 provides as follows:

'The International Sugar Council established under the International Sugar Agreement, 1953, as amended by the Protocol of 1956, shall continue in being for the purpose of administering the present Agreement, with the membership, powers and functions set out in this Agreement.'

There is here, in international law, a position comparable to that of a corporation in English municipal law whose existence is maintained, as in the case of the British Broadcasting Corporation, through successive charters or, in other cases, through successive Acts of Parliament.

One of the principles laid down by Article 63 of the Havana Charter is that, in order to ensure fair play, importing countries shall 'in decisions on substantive matters,

<sup>1</sup> Cmnd. 7375: April 1948.

<sup>2</sup> Cmnd. 9413: April 1955.

have together a number of votes equal to that of' countries mainly interested in exports. The aim of this is to ensure that the Council does not develop into a restrictive organization advancing the interests of exporting countries only. This, of course, raises a difficulty if the metropolitan territories of a country are interested as importers while its dependent territories are interested as exporters or vice versa. In such a case, Article 69 of the Havana Charter permits the dependent territories to be represented separately. This principle has been incorporated in Article III of the International Tin Agreement, which lays down that each contracting government shall, in its instrument of ratification or acceptance or accession, declare its participation either as a producing, or as a consuming, country. But where such a government 'has one or more dependent territories which are mainly interested in the production of tin', it may declare 'the separate participation upon that basis' *sc.* as a producing country 'of such territory or territories, and the provisions of this Agreement shall accordingly apply to such Contracting Government separately in respect of its metropolitan territory and of such dependent territory or territories'. This means that the dependent territories are separately represented and have their own quota of votes which are part of the exporting countries' total of votes. Indeed, before the independence of Malaya, more than half the exporters' total of votes were held by such dependent territories. The international Tin Agreement is, therefore, a striking example of a feature of modern technical agreements on commercial matters also seen in Article XXVI (5) (c) of the General Agreement on Tariffs and Trade, namely, that a dependent territory which is not responsible for its own international relations is nevertheless in appropriate cases allowed to participate in the functioning of an Agreement as if it were a fully sovereign state.

The third section of these Agreements which invites comment is the provision for entry into force. The Agreements on sugar and tin allow 'acceptance' as an alternative to ratification while the Agreement on wheat allows only acceptance. This form of words is becoming increasingly frequent in treaties and must be attributed to the regrettable confusion between ratification as an act in international law and ratification as a constitutional procedure in municipal law usually by the legislature. The executive government in drawing up a treaty which it considers within its executive powers does not want, by using the word 'ratification', to imply that the treaty will be submitted for the approval of the legislature.

It is, however, the arrangements for entry into force of the Agreements on sugar and wheat which are especially unusual. The problem is that such Agreements, as has already been said, can only last for five years; it is not until the end of that period that it is known whether and in what form the Agreement ought to be renewed or continued and, when a conference has met and completed the drafting of a new Agreement, there is no time to pass the new Agreement through the necessary constitutional procedures before ratification or acceptance in countries where this is necessary. On the other hand, it would be serious if there were an interregnum between the two successive Agreements. The basic provision of the International Sugar Agreement, and the International Wheat Agreement is that each comes into force when certain percentages of governments of both importing and exporting countries have accepted the Agreement. But, since, in fact, it is known that sufficient governments will not accept it in good time, the danger of an interregnum is reduced by providing that a declaration by a government in the terms laid down shall be deemed to constitute an acceptance for the purpose of reaching the required percentage.

The International Wheat Agreement deals with the matter by providing, in Article 35 (5), that the acceptance of two-thirds of the exporting and importing governments

by 16 July 1959 is necessary for the Agreement to enter into force, as to Part II on 1 August 1959, and as to the other Parts on 16 July 1959; but Article 35 (6) provides that, if a government notifies that it intends to accept or accede to the Agreement, the notification, 'followed by the deposit of an instrument of acceptance or accession not later than 1 December 1959 in fulfilment of that intention, shall be deemed to constitute acceptance or accession on 16 July 1959 for the purposes of this Article'. The main intention is clear, namely, to make it more probable that the Agreement will enter into force. But what would happen if certain countries, required to achieve the necessary two-thirds, gave a notification but did not, in fact, deposit an instrument before 1 December 1959? Would the notification cease to be effective and the Agreement, as a whole, cease to be in force? If not, why is it said that notification must be followed by the deposit of an instrument? A second problem is what after 16 July is the status of a government which has given such a notification. By Article 35 (6), it is said to be effective 'for the purposes of this Article' as if it were an actual acceptance; but Article 35 (5) lays down that, if the prescribed two-thirds is achieved, it shall enter into force between the Governments 'which have by 16 July 1959 accepted or acceded under paragraphs (2), (3), or (6) of this Article'. The reference to paragraph (6) is significant. It appears, therefore, that the Agreement is binding on such notifying governments. If so, it is not clear how it ceases to apply to those governments if they do not subsequently deposit an actual instrument. The position can only be saved by reading Article 35 (6), summarized above, as meaning that the notification shall bring the Agreement into force in relation to the notifying government but that, if it is not followed by an actual acceptance, it shall cease to apply to that government, presumably, on 1 December. This seems an interpretation of the words which is too remote from their literal meaning to be justifiable.

The same device is adopted, with some refinements, in the International Sugar Agreement. Article 41 (6) provides that 'for the purposes of entry into force of this Agreement' a notification 'containing an undertaking to seek ratification, acceptance or accession in accordance with constitutional procedures . . . shall be regarded as equal in effect to an instrument of ratification, acceptance or accession'. But the paragraph goes on to provide that notifying governments may declare that they will apply the Agreement provisionally, and that, in the absence of such a declaration, the government 'shall be regarded as a non-voting observer'. This status of 'provisional participant or observer' is lost if an instrument of ratification, acceptance or accession is not deposited within the due time. Furthermore, if such an instrument is deposited, 'the obligations under this Agreement . . . shall apply as from 1 January 1959', i.e. retrospectively, 'except to the extent that any Government is required by existing legislation to take action inconsistent with this Agreement by reason of it not being in force either fully or provisionally for that Government at that time'. It is therefore clear that, unless a government declares the provisional application of the Agreement as well, a notification containing such an undertaking does not in itself give rise to any obligations. In this way, the International Sugar Agreement gives a clear and, as far as possible, complete code for dealing with the contingency that the constitutional processes may not be completed by the time that the Agreement must for practical reasons come into force. It could of course, theoretically, have the consequence that, if all the signatories gave the notification but none of them declared for provisional application, the Agreement would be validly in force but no government would be under any substantive obligations under it and the Council, as a legal person, would continue to exist, although no government would be a member or could vote in its deliberations: in short, there would be an Agreement creating no obligations and a corporation without any members



forming it. This position would give rise to difficulties in the field of theoretical jurisprudence: in practice, they have not arisen.

The Agreements discussed in this note may be thought technical and remote from general international law; they are certainly far from the traditional subjects of international law: but they are an example of the way international law has found sufficient flexibility to meet the practical needs of governments and to regulate satisfactorily their relations.

X.

## SOME RECENT APPLICATIONS OF INTERNATIONAL LAW BY THE UNITED STATES. II<sup>1</sup>

### I. *State territory*

1. IN December 1958 Panama decreed a limit of twelve miles for its territorial sea,<sup>2</sup> drawing nourishment no doubt from the trend of views expressed at the Law of the Sea Conference. The United States presented a note to the Panamanian Government protesting against the action. The United States relied upon two propositions that 'no basis exists in international law for claims to a territorial sea in excess of three nautical miles from the base line which is normally the low-water mark on the coast'; and that 'no obligation exists on the part of the states adhering to the three-mile rule to recognize claims on the part of the other states to a greater breadth of territorial sea'. The United States also reserved its rights in the air space over the area covered by the Panamanian decree.

The Panama Canal Zone, the 'use, occupation and control' of which were granted to the United States in perpetuity by the U.S. Panama Convention for the Construction of a Ship Canal,<sup>3</sup> extends three marine miles to seaward of low-water mark on the Caribbean and Pacific sides of the Isthmus.<sup>4</sup> The cities of Panama and Colon, their harbours and adjacent waters, remain under Panamanian jurisdiction.<sup>5</sup> Article III of the Convention provided:

'The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement and within the limits of all auxiliary lands and waters mentioned and described in the said Article II which the United States would possess and exercise if it were the sovereign of the territory within which the said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority.'

The use of the preposition 'within' should be noted. The United States may exercise sovereignty rights to the exclusion of Panama within the territory but does not have sovereignty over it; for example, it could not cede any part of the Canal Zone to another state.

Since the rights accorded to the United States within the territorial seas of the Canal Zone were for the protection of the Canal, the Panamanian Decree appears to diminish this right in breach of the Convention by purporting to place a belt of Panamanian territorial sea between the High Seas and the Canal Zone waters.

<sup>1</sup> © J. E. S. Fawcett.

<sup>2</sup> Republic of Panama, Law No. 58 of 18 December 1958.

<sup>3</sup> The Hay-Varilla Convention concluded in November 1903; *British and Foreign State Papers*, 96 (1905), p. 553.

<sup>4</sup> Convention, Article II.

<sup>5</sup> By Agreement with the United States in 1936 a corridor was established between Colon and Panamanian territory outside the zone, thus creating in a sense a servitude upon a servitude; Vali, *Servitudes of International Law*, p. 260.

The United States reserved its rights in the air space over the area of sea covered by the Panamanian Decree, thereby claiming unrestricted right of access to the Canal Zone by air. However, it may be noted that the Supreme Court of Panama has held that the Convention did not remove the air space over the Canal Zone and its territorial waters from the jurisdiction of Panama. *In re Companai de Transportes de Gelabart*<sup>1</sup> in which the question was raised whether the Courts of Panama had jurisdiction over claims arising from death and injury to passengers in an aircraft which had taken off in Panama and crashed in the Canal Zone it said: 'The accident which is now being investigated, or rather its cause, did not take place in those jurisdictional territories or waters of the Zone in which the Government of the United States enjoys the privilege of the aforesaid permission given by Panama. It occurred in the air; and as the Republic exercises therein its jurisdictional rights of sovereignty its courts should take cognizance of this matter.' This decision is contrary to the assertion by the United States of its unrestricted right to regulate the use of the air space. The decision flies in the face of the fact that the United States has regulated the use of the air space over the Canal Zone continuously since 1913 in both peace and war and without apparently any objection or reservation by Panama.<sup>2</sup>

2. In two recent statutes the United States has taken some steps to clarify its claims and policy in respect of the air space above its territory and outer space.

The Federal Aviation Act of 1958, which is a consolidating statute, provides in s. 1108 (a):

'The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the U.S. exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.'

Further the President is empowered to 'extend the application of this Act to any areas of land or water outside of the United States and the overlying airspace thereof in which the Federal Government of the United States, under international treaty, agreement or other lawful arrangement has the necessary legal authority to take such action.'<sup>3</sup>

The National Aeronautics and Space Act 1958 contains the following definition:

- s. 103 (1) 'The term "aeronautical and space activities" means (A) research into, and the solution of, problems of flight within and outside the earth's atmosphere, (B) the development, construction, testing and operation for research purposes of aeronautical and space vehicles, and (C) such other activities as may be required for the exploration of space; and  
(2) the term "aeronautical and space vehicles" means aircraft, missiles, satellites, and other space vehicles, manned and unmanned. . . .'

Since the aircraft, with which the Federal Aviation Act is concerned, are those designed for navigation or flight through the air, the air space covered by the Act must be taken to be that part of the gaseous envelope of the earth, which is dense enough to support aircraft with piston or jet engines;<sup>4</sup> and it is not co-terminous with the earth's atmo-

<sup>1</sup> *Annual Digest*, 1938-1940, Case no. 45: cited by Vali, op. cit., p. 262.

<sup>2</sup> See Padelford, 'Panama Canal in Time of Peace', *American Journal of International Law*, 34 (1940), p. 601, at pp. 631-4.

<sup>3</sup> s. 1110.

<sup>4</sup> Cf. the traditional definition of aircraft in the Aerial Navigation Convention, 1919, as 'any machine which can derive support in the atmosphere from the reactions of the air'. But the

sphere. The National Aeronautics and Space Act deals with research into and development of flight 'within and outside the earth's atmosphere'.

The two Acts together cover flight, and research into flight, of vehicles and missiles, both in and beyond the earth's atmosphere, but the United States' claim of sovereignty remains strictly limited to the air space and no claims are made either *usque ad coelum* or within fixed distances from the earth's surface. The United States' claim is thus familiar, moderate and well-founded.<sup>1</sup>

The Trusteeship Agreement for the former Japanese Mandated Islands empowers<sup>2</sup> the United States to close any area of the Trust Territory from time to time 'for security reasons'. Such a closure would presumably entitle the United States to exercise in the area the complete and exclusive national sovereignty contemplated by the Federal Aviation Act, s. 1108.<sup>3</sup>

This was the implication of the decision of the U.S. District Court for the District of Columbia in *Pauling v. McElroy*.<sup>4</sup> Here actions were brought by certain U.S. citizens and residents of the Marshall Islands to restrain the Atomic Energy Commissioners and the Secretary of Defence from detonating nuclear weapons over those islands. The Court held on the issues of international law that 'the provisions of the Charter of the United Nations, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and the international law principle of freedom of the seas relied on by plaintiffs are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court. The claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned.' Having declared that the plaintiffs had no right derived from international law to bring the actions, the Court was not bound to say precisely which were the 'sovereignties concerned'. It is difficult to see how they could be other than the United States themselves; for wherever sovereignty over Trust Territory may in fact lie, the United States was certainly exercising for the time being exclusive sovereignty over the area in carrying out the tests.

## II. Recognition

In September 1958 the State Department sent to all U.S. Missions abroad a Memorandum<sup>5</sup> in which the non-recognition by the United States of the Communist Government of China was closely reasoned and defended at length.

At the root of the U.S. policy lies the doctrine that recognition is a privilege, not a right, and is therefore simply an instrument of national policy. This was expressed with characteristic force and clarity by Secretary of State Dulles in a broadcast interview in June 1958.<sup>6</sup>

'We recognize governments often times whether we like them or not, but the primary consideration, I think, in terms of recognition is: will recognition serve to advance the interests of your own country? Recognition is not a right. No group has a right to be recognized. We did not recognize the puppet governments that were set up in Europe

distinction between 'navigation' and 'flight' in the Federal Aviation Act is not complete and the Act appears to cover also the flight of pilotless aircraft and ballistic missiles through the air space.

<sup>1</sup> Compare the Aerial Navigation Convention, 1919: 'every Power has complete and exclusive sovereignty over the airspace above its territory'; ICAO Convention, 1944, Article 1: 'The Contracting States recognize that any State has complete and exclusive sovereignty over the airspace above its territory.'

<sup>2</sup> Article 13.

<sup>3</sup> This would not imply of course 'possession' of sovereignty: compare the position in the Panama Canal Zone outlined above.

<sup>4</sup> (1958) 164 F. Supp. 390.

<sup>5</sup> State Department Bulletin 1002, pp. 285-290.

<sup>6</sup> Ibid. 994, p. 64.



during the war. They were *de facto* governments. We did not recognize the puppet government that the Japanese set up in China although it was in effective control. Why? Because it did not serve our interests to do so.'

The Memorandum ranges over the political and the legal issues of recognition. In dealing with the legal basis of non-recognition, it asserts that, even if there can be entitlement to recognition in international law, the Communist Government of China would not be entitled for a number of reasons: first, the Peking Government does not rule all China, there being a substantial force in being contesting its claim to do so; second, regimentation, repression and forced sacrifices demanded of the people and the consequent extensive popular unrest show that the régime does not represent the will of the people substantially declared; third, the régime has manifested no intention to honour its international obligations: treaties have been abrogated, the property of foreign nationals confiscated, provisions of the Korean Armistice and of the Geneva Accord on Viet Nam and Laos have been broken. In this connexion, the Memorandum declares that recognition would inevitably lead to the seating of the Peking Government in the United Nations though 'it is unpurged of aggression'.

A study of these propositions shows that they express and indeed perhaps serve to re-establish the traditional policy of the United States in the recognition of governments; and it suggests that recognition of the Communist Government would, whether justified politically or not, be a striking departure from that policy.

The first two propositions are closely linked and must be treated together. The first is doubly ambiguous, since in declaring that the Peking Government does not rule 'all China' it may either be referring to mainland China only or may comprise Quemoy and Matsu and the other smaller offshore islands. It is also ambiguous in that 'the substantial force in being' may be a description either of dissident or rebellious groups in the mainland provinces or of the Nationalist forces in the offshore islands and Formosa. However, since the Memorandum states in a later passage that the United States recognizes that 'the Peking régime is currently in control of mainland China', the proposition must probably be taken to refer to the fact that the offshore islands,<sup>1</sup> which are indisputably Chinese territory, are occupied by Nationalist forces claiming to be the lawful Government of China.

But in so far as this first proposition is predicated on the principle of effectiveness of government as a ground of recognition, the lack of control of so minute a portion of the national territory seems an inadequate reason for denying that effectiveness. It is easier therefore to take both propositions together as asserting in effect that, in the view of the United States, the Communist Government does not meet the test of popular assent.

A people may establish or change their government by constitutional means, in which there is continuity in the forms of government, or by revolutionary means, in which there is discontinuity. 'To deny an insurgent the right to prevent the enemy from receiving material aid cannot well be justified without denying the right of revolution', said Secretary of State Hay in 1907.<sup>2</sup> But the kinds of revolutionary

<sup>1</sup> But not Formosa and the Pescadores, since the United States has not gone further than recognizing, in the Security Treaty with the Nationalist régime, that the Nationalists 'control' those islands; and the Senate Foreign Relations Committee, reporting on the Treaty, added the declaration that 'nothing in the Treaty shall be construed as affecting or modifying the legal status or sovereignty of the territories to which it applies': see O'Connell 'The Status of Formosa', *American Journal of International Law*, 50 (1956), pp. 405, 410.

<sup>2</sup> Quoted by Lauterpacht, *Recognition*, p. 106.

change which present an issue of recognition may range from popular uprisings to the imposition by a minority of a totalitarian régime.

A successful popular uprising is itself an expression of popular assent to the new government. The seizure of power by an individual or a party, however, is often ambiguous. The new rulers may truly represent the will of the majority; yet 'in very many cases . . . revolutions in the Republics in question [*sc.* Central America] have no basis in principle, but are due merely to machinations of conscienceless and ambitious men, and have no effect but to bring new sufferings and fresh burdens to an already oppressed people', said President Taft in a message to Congress.<sup>1</sup> The recognition of these and of totalitarian régimes must, in the traditional American view, depend upon the assent of the people being somehow expressed. In 1792 Thomas Jefferson had declared as Secretary of State that: 'It accords with our principles to acknowledge any government to be rightful which is formed by the will of the people substantially declared',<sup>2</sup> and U.S. practice on recognition is a history of efforts, sometimes attenuated and devious, but always persistent, to maintain this rule.

Two strands can be discerned in this history: first, what is believed to represent the dominant rule, the recognition of *de facto* authority, *exercised with popular assent*, without regard to the exact form of government or its constitutional derivation; and second, the principle associated with President Wilson's policy towards Central America and to be regarded perhaps as anomalous, that constitutionality is one of the criteria of recognition of a new government.<sup>3</sup>

In an instruction to its Minister in Bolivia in September 1900, the U.S. Government declared:

'The policy of the United States, announced and practiced upon occasion for more than a century, has been and is to refrain from acting upon conflicting claims to the *de jure* control of the executive power of a foreign state; but to base the recognition of a foreign government solely on its *de facto* ability to hold the reins of administrative power. When, by reason of revolution or other internal change not wrought by regular constitutional methods, a conflict of authority exists in another country whereby the titular government to which our representatives are accredited is reduced from power and authority, the rule of the United States is to defer recognition of another executive in its place until it shall appear that it is in possession of the machinery of the state, administering government with the assent of the people thereof and without substantial resistance to its authority, and that it is in a position to fulfil all the international obligations and responsibilities incumbent upon a sovereign state under treaties and international law.'<sup>4</sup>

So Secretary of State Hughes in July 1923, writing to Mr. Gompers, President of the American Federation of Labour, said of the non-recognition of the U.S.S.R.:

'We are not concerned with the question of legitimacy of a government as judged by former European standards. We recognize the right of revolution, and we do not attempt to determine the internal concerns of other states.'<sup>5</sup>

Secretary of State Stimson in 1931 expressly renounced Wilson's tests of 'constitutionality'. 'The present administration', he said, 'has refused to follow the policy of Mr. Wilson and has followed consistently the former practice of this Government since the days of Jefferson. As soon as it was reported to us, through our diplomatic representatives, that the new governments in Bolivia, Peru, Argentina, Brazil and

<sup>1</sup> 3 December 1912: U.S. Foreign Relations (1912), p. xiii.

<sup>2</sup> *Works* (4th ed.), vol. 3, p. 489. It will be observed that the Memorandum borrows Jefferson's language.

<sup>3</sup> For this phase of U.S. policy see the Central American Treaties of 1907 and 1923; *Hackworth*, vol. 1, pp. 180-5, 191.

<sup>4</sup> *Ibid.*, p. 175.

<sup>5</sup> *Ibid.*, p. 177.

Panama, were in control of the administrative machinery of the state, with the apparent general acquiescence of their people, and that they were willing and apparently able to discharge their international and conventional obligations, they were recognized by our Government.<sup>1</sup>

At the Bogota Conference of American States in 1948 the principle was adopted 'that the establishment or maintenance of diplomatic relations with the government does not imply an opinion on the domestic policy of that government'.<sup>2</sup> The United States was a party to this Resolution.

But judgment upon the domestic policies of a foreign government is entirely different from a belief that the government has no popular foundation; and though the grand principle of popular assent substantially declared has sometimes, in United States practice, faded into an acceptance of 'long continued acquiescence', 'the absence of active resistance', and the illusion of electoral freedom under totalitarian régimes, the popular support of government remains a prerequisite of recognition by the United States, and the Memorandum on China reaffirms it.

The willingness and ability of the Government to perform its international obligations was made a test of recognition by the United States of the Mexican Government in 1923 and was an important factor in its delay in recognizing the U.S.S.R. The U.S. Government charged the Soviet Government with failure to respect and protect foreign persons and property, repudiation of the international undertakings of preceding governments, and interference in the internal affairs of other states. 'The persons of our citizens in Russia are for the moment free from harm', wrote Secretary of State Hughes in the letter cited above, but 'no assurance exists, however, against a repetition of the arbitrary detentions which some of them have suffered in the past. The situation with respect to property is even more palpable. The obligations of Russia to the taxpayers of the United States remain repudiated. The many American citizens who have suffered directly or indirectly by the confiscation of American property in Russia remain without the prospect of indemnification. We have had recent evidence, moreover, that the policy of confiscation is by no means at an end.'

This non-observance of international obligations has two elements: lack of reciprocity of treatment between the recognizing government and the government to be recognized; and failure of the government to be recognized to conform to international standards of conduct.

The first element may be properly decisive where recognition is regarded solely as an instrument of national policy. The proffer or withholding of recognition may be used to persuade the government to be recognized to meet claims in respect of the persons or property of the nationals of the recognizing government. Thus the recognition by Great Britain of the Mexican Government in 1861 was made 'contingent upon the acknowledgement by that government of the liability of Mexico for the claims of British subjects, who, either in their person or their property, for a long series of years can be proved to have suffered wrong at the hands of successive governments in Mexico';<sup>3</sup> and Secretary of State Dulles insisted repeatedly upon the detention of certain American airmen by the Chinese Communist Government as a bar to its recognition.

The second element belongs to a different order. Such a refusal of recognition implies that a government, which deliberately flouts international standards of conduct,

<sup>1</sup> Address before the Council of Foreign Relations in New York City on 6 February 1931: *Hackworth*, vol. 1, p. 185.

<sup>2</sup> Resolution 35 of the Final Act.

<sup>3</sup> Lord John Russell in a dispatch: *British and Foreign State Papers*, 52 (1861), p. 237, cited by Dr. G. Schwarzenberger in a letter to *The Times*, 9 January 1950: *Chen*, op. cit., p. 125.



is not entitled to recognition. So Dr. Evatt, Minister of External Affairs in Australia, said of the Chinese Communist Government, soon after its assumption of power in 1949, that it could not be recognized 'in the absence of specific assurances that the territorial integrity of neighbouring countries, notably Hong Kong, would be respected and that the new China would discharge all international obligations'.<sup>1</sup>

Such an international standard of recognition is wholly opposed to the use of recognition as a bare instrument of national policy, and it should be observed that the Memorandum discusses it only on the hypothesis, not apparently accepted in the Memorandum, that a government *can* be entitled to recognition. However, in declaring that recognition of the Communist Government of China would inevitably lead to its seating in the United Nations though 'it is unpurged of aggression', the Memorandum does not wholly escape reliance upon an international standard.

Aggression by a member of the United Nations is a breach of the Charter and probably now of international law. But if the Communist Government in Peking is to be not recognized as the lawful government of China, how can its acts be attributed to China as a member of the United Nations? If, however, its acts of aggression, as breaches of international law, are said to forfeit its admission to the seat of China in the United Nations until those acts are 'purged', whatever that may now mean, there is a standard of international conduct invoked.

It is then doubtful whether static non-recognition is an adequate sanction<sup>2</sup> and whether the United Nations would not have more influence with a government in rather than outside the organization.

### III. *Treaties*

*Heaton v. Delco Appliances Division, General Motors Corporation*<sup>3</sup> provides an interesting example of the application of the inter-temporal law in the interpretation of treaties. A British subject appealed from the decision of the Workmen's Compensation Board, directing payment to him of one-half of the commuted value of an award in respect of the loss of the use of an arm, in accordance with Section 17 of the Workmen's Compensation Law. This section provided that compensation payable under the Act to aliens should be in the same amount as provided for residents subject to certain limitations of which the commutation of award was one. The appellant contended that this provision was not applicable to him as being inconsistent with the Jay Treaty, 1794, and the United States-Great Britain Convention<sup>4</sup> as to Tenure and Disposition of Real and Personal Property 1899.<sup>5</sup>

<sup>1</sup> Cited Chen, *op. cit.*, p. 125.

<sup>2</sup> Compare McNair, 'The Stimson Doctrine of Nonrecognition', in this *Year Book*, 14 (1933), pp. 65, 73-74.

<sup>3</sup> 1958 (180 N.Y.S. 2d 2 D 173).

<sup>4</sup> Article X.—'Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor monies which they may have in public funds, or in the public or private banks, shall ever in any event of war or national differences be sequestered or confiscated, it being unjust and impolitic that debts and engagements contracted and made by individuals, having confidence in each other and in their respective governments, should ever be destroyed or impaired by national authority on account of national differences and discontents.'

<sup>5</sup> Article II.—'The citizens or subjects of each of the Contracting Parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other Contracting Party, whether resident or non-resident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases.'

The Court disposed of the invocation of the Jay Treaty by applying the doctrine of the inter-temporal law.<sup>1</sup> The Court said:

'considering the terms, conditions and circumstances, under which Article X became part of the Treaty of 1794 and giving to it the most favoured interpretation it was never intended by the Contracting Parties to include our present day form of compensation between employer and employee or anything vaguely similar to it that might have been in effect at the time of the Treaty. . . . We conclude that as to the Treaty of 1794 and the Convention of 1899 there is nothing in the language, taking into consideration the time, circumstances and conditions when they were written and also the present day circumstances that can overcome or abrogate Section 17 of the Workmen's Compensation Law and the State of New York.'

In contrast,<sup>2</sup> Section 17 of that law was found inconsistent with the United States-Italy Treaty of Commerce and Navigation 1949, Article XII-(1) which reads:

'The nationals of either High Contracting Party, regardless of alienage or place of residence, shall be accorded rights and privileges no less favorable than those accorded to the nationals of the other High Contracting Party, under laws and regulations within the territories of such other High Contracting Party that (a) \*\*\* (b) grant to a wage earner or an individual receiving salary, commission or other remuneration, or to his relatives, heirs or dependents, as the case may be, a right of action, or a pecuniary compensation or other benefit or service, on account of occupational disease, injury or death arising out of and in the course of employment or due to the nature of employment.'

Here it is plain from the provisions of the Treaty that rights arising under the Workmen's Compensation and similar contemporary statutes were intended to be covered.

As to the 1899 Convention, it might perhaps have been a simpler solution to read it, as appears clearly to have been the intention, as confined to the disposal of such personal property as the alien may possess or acquire under the respective systems of municipal law of the Contracting Parties. The Court, however, appears to have dealt with this comparatively modern Convention by applying the inter-temporal law to it as well as to the much earlier Jay Treaty.

#### IV. War

1. In *Navios Corporation v. Rio Azul Compania Armadora, Panama and Others*<sup>3</sup> the corporation sought to recover damages for the alleged breach by the three respondent companies of time charters covering three vessels. Each of the charters contained a war clause to the effect that 'if war is declared against any present NATO countries', thus including France and the United Kingdom, the owners would have the right of cancellation of the charter party. The three companies, owning the three vessels, invoked the clause and purported to cancel the charter parties on 6 November 1956 in the course of the hostilities in Egypt.

The U.S. District Court for Maryland concluded that a public address by President Nasser delivered on 1 November 1956 to a large gathering of people in Cairo and broadcast throughout Egypt constituted a declaration of war 'both in the ordinary sense of those words and in their technical sense in the field of international law'. The

<sup>1</sup> 'A juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled': *Island of Palmas* case, 2 R.I.A.A. 1928, p. 845; and see Sir Gerald Fitzmaurice in this *Year Book*, 30 (1953), pp. 5-7.

<sup>2</sup> *Iannone v. Radory Construction Corporation* (1955), 141 N.Y.S. 2d 311, confirmed by the New York Court of Appeals 150 N.Y.S., Section 199.

<sup>3</sup> 161 F. Supp. 932, 1958.

Court therefore dismissed the libels to recover damages and its decision was affirmed by the Circuit Court of Appeals.

The Court set out to construe the phrase 'if war is declared' very strictly, holding that it was not sufficient that one of the named N.A.T.O. countries be engaged in war, but that a declaration would have to have been made against it for the clause to become operative. Nevertheless, the Court declared that the phrase should be interpreted as it would be understood by businessmen engaged in the shipping business in the United States, 'in the light of the purpose which the clause was intended to accomplish'. As the Court said in other words, 'the closing of the Canal and the increase in freight and charter rates lent equitable support to the argument that the clause should not be given a highly legalistic construction to defeat owners' right to cancel'.

Dr. Jessup, called as an expert witness for Navios Corporation, gave as his opinion that President Nasser's speech did not constitute a declaration of war for a number of reasons: its language was hortatory; Egypt had not notified the United Nations that a state of war existed; and a declaration of war was hardly consistent with the Charter; further it was not in Egypt's interest to declare war against France and the United Kingdom, since it would make Egypt's funds in those countries subject to confiscation as enemy property and further give them ground for wider military action in the Suez Canal Zone than the limited objectives set out in their ultimatum of 30 October. The Court found none of these reasons convincing and accepting a number of arguments against them presented by the late Professor Eagleton called as expert witness for the companies. In particular, the Court observed that 'the Charter permits defensive war and Nasser took the opportunity to characterize the British and French as aggressors'. The Court considered the fact that the United Kingdom and France disclaimed any intention to make war on Egypt as immaterial. It concluded that Nasser's speech constituted a public announcement by the competent Egyptian authority that there was a state of war.

J. E. S. FAWCETT

## RECOGNITION AND MODERN METHODS OF INTERNATIONAL CO-OPERATION<sup>1</sup>

THERE are certain tendencies in modern international relations which have had a deep impact on well-established institutions of international law. One of these institutions is recognition. Its place and functions have been seriously affected not only by the development of traditional treaty relations but particularly by the new methods of international co-operation as shaped by multilateral treaties, international conferences and organizations.

The link between recognition and international treaties is not of recent origin. History offers examples of treaties sanctioning the birth of new States, as in the case of Uruguay,<sup>2</sup> Greece,<sup>3</sup> or Poland at Versailles. Other treaties admitted existing States into what was called the family of civilized States<sup>4</sup> in days when Lorimer divided cases of recognition into three groups reflecting the division of the human race according to their standards of civilization.<sup>5</sup> In other treaties, States laid down certain principles

<sup>1</sup> © Professor Manfred Lachs.

<sup>2</sup> The Treaty of peace between the Argentine and Brazil, 8 October 1828.

<sup>3</sup> The Treaty of London, 3 February 1830, Article 1.

<sup>4</sup> The Treaty of 30 March 1856, Article 7, concerning Turkey, the Treaty of Berlin, 13 July 1878, Articles 26, 34 and 43, concerning Montenegro, Roumania and Serbia.

<sup>5</sup> Lorimer, *Institutes of the Law of Nations* (1883-4), vol. 1, pp. 101-2.



which they would apply in common with regard to recognition. Such were the protocol of Troppau (1820) and the Washington Treaty concluded between the Central American States in 1923.<sup>1</sup>

Even in the days when recognition was considered a precondition—baptism as it were—for enabling States of Asia and Africa to enter into relations with European States, the formal act of recognition was sometimes dispensed with in favour of what was called 'implied recognition'. On the one hand it was claimed that European States needed no recognition. The function of recognition was limited to the manifestation of the wish to enter into mutual relations; it was so viewed by Lawrence and Strisower. On the other hand, the conclusion of a treaty was considered as in itself implying recognition. This was confirmed in *The Helena*, in which the claim that Algiers was nothing more than a pirate gang was dismissed, in view of a treaty concluded between the Bey and King George III.<sup>2</sup> Twenty-one years later, Secretary of State Adams rejected the protest of the Spanish Minister, lodged in connexion with the recognition by the United States of former Spanish colonies, on the ground that treaties concluded between Spain and Columbia, Mexico and Peru were tantamount to the recognition of their independence.<sup>3</sup>

In process of time, even unratified treaties were considered as evidence of recognition. In this connexion one can quote the two treaties negotiated between the United States and Turkey in 1923, after a lapse of six years during which the United States did not recognize the then Government of Turkey. An intention to restore diplomatic relations between the two countries was read into them and they were viewed as implying recognition.<sup>4</sup>

During the last thirty years, practice has furnished numerous examples of treaties of all sorts being concluded with unrecognized governments. The agreement between France and the Russian Soviet Federal Socialist Republic (R.S.F.S.R.) of 1920 dealt with matters of repatriation, while recognition took place only four years later by an exchange of telegrams between Tchitcherin and Herriot. Similar was the position taken up by Great Britain, who did not consider an agreement concluded with the R.S.F.S.R. in 1920 as implying recognition. It was only by a later treaty that she meant to produce this result, as can be seen in the famous *Luther* case.<sup>5</sup>

In course of time, an ever-growing number of bilateral treaties has recorded relations between parties which have not formally recognized one another. Governments engage in negotiations of economic or other kinds, conclude short- or long-term arrangements, which result in frequent contacts between their authorities. They carry out these agreements, and yet formal recognition is not forthcoming. One contemporary example is particularly significant. The ambassadors of two Powers held scores of meetings at which they discussed not only technical issues, but also wider problems of security,<sup>6</sup> and yet even now there has been no formal act of recognition.

All these examples indicate the trend towards establishing treaty relations without any prior formal act of recognition. This trend, significant although it is, constitutes but one side of the picture. For traditional bilateralism offers by its very nature only limited possibilities in this field. Frequently, reasons of a political character restrain governments from concluding agreements with other governments whom they do not

<sup>1</sup> Concluded between Guatemala, El Salvador, Honduras, Nicaragua and Costa Rica, 7 February 1923.

<sup>2</sup> (1801), L. C. Rob. Ad. 3, 5 (Sir William Scott).

<sup>3</sup> Moore, *Digest of International Law* (1906), vol. 1, pp. 87-88.

<sup>4</sup> Hackworth, *Digest of International Law* (1944), vol. 1, pp. 311-12.

<sup>5</sup> *Luther v. Sagor* (1921), 1 K.B. 456 and, [1921] 3 K.B. 536.

<sup>6</sup> Sino-U.S. meetings in Geneva and later in Warsaw.

recognize, lest these agreements be considered as implying recognition. Accordingly, were inter-State relations limited to the field of bilateralism, the possibilities of contacts with unrecognized parties would remain limited.

Much more significant is the development in the field of multilateral relations. Even more frequently, representatives of States and governments which have not previously recognized each other attend the same conferences, sit at the same table, exchange words—sometimes very unkind words—and vote for resolutions or draft documents by which they may be bound to mutual action or long-term arrangements. From the fourth Pan-American Conference of 1910, through the years between the wars, when the Soviet Union attended many international gatherings prior to her recognition by some of the other great Powers (particularly the United States) up to recent years, when the Chinese People's Republic has participated in conferences with Powers who do not yet recognize her Government, examples of this practice have been rich indeed.

One must not, of course, overlook the fact that on many occasions invitations to such conferences were not extended to unrecognized States and governments. In particular, host States were often unwilling to offer facilities to delegations from unrecognized States or governments.<sup>1</sup> But a detailed analysis of the practice proves that the same States acted in similar situations differently, and did not act on any general principle. The cases of the Congress of the Universal Postal Union (1929) and that of the International Monetary and Economic Conference (1933) are but two illustrations that can be offered.<sup>2</sup>

Even more significant is the situation in international organizations. For international conferences are short-lived and the links between their participants are but provisional, while in international organizations the unrecognized States or governments present a more enduring problem. Some international organizations admit, in the capacity of members, entities which have not reached statehood, and which therefore are recognized as States by no one. The World Health Organization registered Nigeria, Morocco, the Sudan and Tunisia as associate members prior to their reaching full independence, and still so registers Sierra Leone. The Universal Postal Union includes the Belgian Congo, French Overseas territories, Portuguese provinces in Asia and Africa, and Spanish colonies. Similar is the situation in the international Telecommunications Union, the World Meteorological Organization and the United Nations Organization for Food and Agriculture. It is true that the territories in question do not always enjoy the status of full members and that as a rule they are admitted only on the basis that they are internally self-governing at least in the matters coming within the sphere of the Organization concerned. Still, the very character of the 'members' in these cases shows that membership of an international organization is not necessarily conditioned by prior recognition of statehood.

Objection could be made to general conclusions being drawn from the cases quoted above. For the Organizations concerned involve purely technical matters, in which international co-operation is assured by certain branches of administration, public services and in some States by private enterprise. Yet it is a fact that these methods of co-operation become daily more important—that it is in them that the activity of the State manifests itself much more concretely, much more visibly and effectively than in many others. It is in these fields that international rapprochement is most advanced.

<sup>1</sup> Aufricht, 'Principles and Practises of Recognition by International Organisation', *American Journal of International Law*, 43 (1949), p. 687.

<sup>2</sup> Hackworth, *op. cit.*, pp. 346, 347.

This is the reflex of technological and scientific progress which has brought nations closer together in affairs concerning their daily life.

The admission of dependent peoples and territories to certain international organizations has a double effect. On the one hand it is a step forward towards their statehood; on the other, it indicates that their recognition as independent states is not a precondition for their participation in this particular sphere of international co-operation. Recognized or unrecognized, these entities are in this way operating in many fields and in an ever-growing degree.

Not less significant is the development taking place within international organizations of a political character. Among the members of the League of Nations there were some entities which were not States *sensu stricto*, and some which were not recognized as States by other members.<sup>1</sup> From a purely formal point of view, it was rightly held that admission to the League was not equivalent to recognition, in spite of the argument of Politis to the contrary.<sup>2</sup> Nor could exclusion from the League be regarded as amounting to the withdrawal of recognition.

Although the United Nations is composed only of States, the situation as regards recognition is similar. The test of universal recognition does not control admission to the Organization; nor can it operate later in case of governmental changes occurring while the admitted State remains within the Organization. The criteria of admission are laid down in Article 4 of the Charter, but this Article ceases to apply once the process of admission is completed. As regards the recognition of governments, it would obviously be contrary to the letter and spirit of the Charter to make the right of participation of members in the Organization dependent on the recognition by other members of governmental changes which have occurred within their territories. This seems to be the common view on the subject.<sup>3</sup>

Thus contemporary international organizations do not make admission conditional on prior recognition of the applicant by all the members. Consequently we find among the members of such organizations, not excepting the United Nations, States whose governments are not recognized by some members, and even States not recognized by some members.

Similar is the situation regarding multilateral treaties *sensu stricto*. They cover today many fields: communication on land, in the air and at sea, trade and commerce, fisheries and health, science and culture. They even enter the field of politics, thus covering problems which have been the exclusive domain of bilateral agreements. This growth and development of multilateralism is the natural outcome of what one should regard as the process of shrinking distances and the increasing mutual dependence of nations. Their inevitable result is co-operation in many fields carried out without formal acts of recognition.

That is how international instruments at the stage of their inception (i.e. at the conference table) and in the process of implementation by the mechanisms they bring into being (i.e. international organizations), and in many other forms, have

<sup>1</sup> Panama was a member of the League, not recognized by Columbia till 1924; the Covenant provided for the admission of 'dominions and colonies' (Article 1, s. 2).

<sup>2</sup> *Records of the First Assembly: Meeting of the Committees*, vol. 2, pp. 157, 160-2; Friedlander, 'The Admission of States to the League of Nations', this *Year Book*, 9 (1928), p. 84. Cf. also the questionnaire of the 5th Committee, which contained a question concerning recognition. Chen is, however, right in suggesting that the question was meant only for information purposes, as the example of States admitted at the First Assembly proves. Chen, *The International Law of Recognition* (1951), p. 212.

<sup>3</sup> See the *Memorandum of the Secretary General of the U.N.*, March 8, 1950, U.N. Press Release PM/1704.



exceeded the limits imposed by recognition, or the lack of it, on bilateral relations between states and governments. Multilateralism has thus proved to be the way to international co-operation in circumstances in which bilateral relations, for the reasons indicated above, would make co-operation less possible. This can be seen even on the formal side in accession clauses. The multilateral treaty may be open to governments, or even States, not recognized by all the original signatories. Some accession clauses, for example, Article 6 of the fourth Hague Convention of 1907, make the treaty accessible *erga omnes*.<sup>1</sup> Article 3, s. 2, of the Kellogg-Briand Pact even stipulated that the Pact is to remain open as long as may be necessary for adherence by all the other Powers of the world. Similar provisions are found in the Anti-War Pact of Rio de Janeiro of 1933 and of the four Geneva Conventions of 1949.

Even more important are the implications of the substantive provisions of many multilateral treaties and statutes of international organizations. Members of the League of Nations assumed an obligation in Article 10 of the Covenant to respect the territorial integrity and political independence of other Member States, some of which might not be recognized by all the States. By signing the Pact of Paris, the Powers concerned renounced war as an instrument of national policy in their mutual relations. The Charter of the United Nations imposes upon the members of the Organization duties of capital importance. Even the agreement of 1920 on repatriation, which France refused to regard as evidence of recognition of the R.S.F.S.R., contained a clause placing an obligation on France to refrain from interfering in the domestic affairs of Russia. This implied a duty of non-aggression and amounted to a form of non-aggression pact.

Some of these treaty rights and obligations go much beyond what would be involved by recognition, even were it accorded.<sup>2</sup> For recognition does not imply the duty to defend and protect the most vital rights of other recognized States or governments. Thus we find a situation in which Parties to treaties who refuse recognition to some of the other signatories offer them guarantees and establish links with them which are more important and much wider than recognition, if accorded, would offer.

The conclusion to be drawn is that treaty co-operation, particularly of a multilateral kind, while not amounting to recognition and in some ways less than recognition, frequently amounts to more than recognition. The lack of recognition does not mean that the two States or governments concerned have no relations whatsoever. It means only that they do not have those relations which are the usual result of recognition in bilateral contacts.<sup>3</sup>

There is one caveat that has to be entered. Sometimes the effects of multilateral treaty co-operation are limited by reservations or declarations made by some of the parties as to the effect of their ratifications or accessions *vis-à-vis* States or governments which they do not recognize. These reservations can be grouped into three categories:

- (a) refusal to admit the unrecognized State or government to any participation in the multilateral instrument;<sup>4</sup>

<sup>1</sup> Zemanek, 'Die Entwicklung des Völkerrechtlichen Vertragrechtes', *Zeitschrift für öffentliches Recht*, 6 (1954), pp. 380, 381.

<sup>2</sup> Erich, 'La Naissance et la reconnaissance des Etats', *Recueil des Cours* (1927), p. 66.

<sup>3</sup> Hudson is right in stating: 'The Government of the United States has not recognised the Government of the Union of Socialist Republics. This does not mean that in the view of the Government of the United States the Government of the Union of Socialist Soviet Republics does not exist. . . . Nor does it mean, necessarily, that the two governments can have no relations with each other.' 'Recognition and Multipartite Treaties', *American Journal of International Law*, 23 (1929), p. 127.

<sup>4</sup> Article 10 of the Treaty concerning Spitsbergen (Paris, 9 February 1920); also contemporary examples concerning the Chinese People's Republic.

(b) refusal to accept any obligations resulting from the treaty *vis-à-vis* the unrecognized State or government;<sup>1</sup>

(c) a declaration that participation in the treaty does not amount to recognition.<sup>2</sup>

In most cases these declarations have little or no connexion with the character and purpose of the treaty itself. On the whole, they cannot be considered helpful in the development of international co-operation, as they create a vacuum, where participation in the treaty activity seems advisable. In one case, however, they may serve a legitimate purpose—namely, when all the parties to a treaty make common cause in rejecting the participation of a 'State' or 'government' which has come into being as the result of violation of essential principles of law, as was the case with Manchukuo.<sup>3</sup> As to reservations refusing to accept obligations *vis-à-vis* an unrecognized entity, the practice even of the same States is apt to vary with the character of the treaty. There was no such reservation in the case of the Kellogg-Briand Pact, which was indeed a case where it would have produced most complicated results. How would the outlawry of war, which at that time was only conventional law, have operated between the United States and the Soviet Union?<sup>4</sup> The mere mention of this point indicates the possible implications of such reservations. The same applies also to treaties which confirm generally recognized principles of international law, for these principles are in force irrespective of the treaties about them concluded by particular States. Were it otherwise, a party to these treaties would be offered, with respect to a State not recognized by that party, the opportunity to evade obligations generally binding *erga omnes*.

As to declarations which deny that participation in the treaty by the declarant State implies any recognition of another participating State or government not recognized by the declarant State—they produce no specific legal effect. That is why it is rightly maintained that they merely have the character of statements made *ex abundante cautela*.<sup>5</sup>

A different situation arises when a government, recognized by some parties as lawfully representing the country in question, is not admitted to a conference, its place being perhaps taken by representatives whom other parties claim to be authorized to sit at the conference table. In these cases the problem of recognition does not seem properly to arise. It is rather a question of the treaty having no effects with regard to the unrepresented State or government,<sup>6</sup> which was improperly represented or rather not represented at all.

<sup>1</sup> See the declaration of the Government of the United States at the signature of the International Sanitary Convention (21 June 1926), and other cases quoted by Hackworth, *op. cit.*, p. 349.

<sup>2</sup> See the declaration of the representative of Austria at the Conference concerning the Scheldt (1863) in connexion with the participation in it of a representative of Italy; *Fontes Juris Gentium* (Digest of Diplomatic Correspondence of the European States), (1856-71), vol. 1, (re 32), pp. 156-8. See also the declarations mentioned under 20, and other quoted by Hackworth, *op. cit.*, pp. 348-50.

<sup>3</sup> See resolution of the Assembly of the League of Nations (11 March 1932), *League of Nations Official Journal* (Special Supplement), 101 (1932), pp. 87-97; also Hackworth, *op. cit.*, pp. 335-7.

<sup>4</sup> Hudson defined the situation as follows: 'Surely the United States and the Union of Socialist Soviet Republics may participate in a common condemnation and renunciation of this sort without entering into any regular, diplomatic relations. . . . It is gratifying, therefore, that when the Paris Treaty of August 27, 1928, was ratified by the United States in January 1929, the action taken with reference to the International Sanitary Convention was not followed as a precedent. . . .' (*loc. cit.*, p. 132).

<sup>5</sup> Lauterpacht, *Recognition in International Law* (1947), p. 374.

<sup>6</sup> See the declarations of Poland, U.S.S.R., Czechoslovakia and the United Kingdom at the signature of the International Sugar Agreement, London, 16 October 1953, at which the Govern-

In the light of what has been said, it seems clear that there is no necessary connexion between the establishment of links resulting from modern multilateral instruments and recognition. The conclusion of a treaty with an unrecognized entity amounts only to an admission of the treaty-making capacity of the other party, as Lauterpacht<sup>1</sup> puts it; or recognition for the purposes of the treaty, as Hudson<sup>2</sup> sees it. These views do not seem to conflict. The realities of international life have made it a necessity to deal with issues great and small by way of multilateral treaties, sometimes when considerations alien to the subject of the treaty have made other forms of inter-State co-operation impossible or at least difficult.

The phenomena discussed above are of undeniable importance, on the one hand, for the development of treaty law and, on the other, for the place of recognition within the framework of international law. The increase in multilateral contacts, itself a reflection of a new quality of international relations—has had a decisive influence on the doctrine of recognition. The following figures indicate the trend: in the years 1864–99, 133 multilateral treaties were concluded, and 124 in the years 1900–19, but between 1920 and 1937 there were as many as 550. Finally, within only ten years of the establishment of the United Nations we find 576 multilateral treaties registered with the Organization.

Three further factors deserve to be noticed. The first is the growth in the actual numbers of the international community. While only 15 States attended the Congress of Berlin, 44 participated in the works of the second Hague Conference and today the United Nations has 82 Member States. The Congress of 1874, at which the Universal Postal Union was born, was attended by 22 States; today its membership has risen to 96. Hardly a year passes without a new State being born. The second is the growth of multilateral contacts other than through treaties—namely, through international conferences and international organizations. As to conferences, the figures are most impressive: between the years 1826 and 1899 133 international conferences in all were held. In our day about a score of conferences take place every year. The number of international organizations which have come into being, in particular during the post-war years, is especially important. The third factor is the great variety of political and economic systems represented in the world of today. The differences in the political and economic institutions of the members of the international community merit special attention. The mutual relationships of these members is undergoing constant change.

These factors and developments constitute the background against which the evolution of the doctrine of recognition has to be viewed. Recognition continues of course to be important in its effects in the domestic legal field on rights in private law and on immunity from legal process; though even here elements based on the mere *de facto* character of a foreign government appear to be playing an increasing part. The important changes in recognition have occurred with reference to its function as the starting-point for international intercourse. The extension of multilateral treaty relations in many fields offers unrecognized States and governments an opportunity to participate in many activities, to solve many of their problems without formal recognition. Though political considerations enter even into this sphere, they do so more rarely, and in some cases there is little basis for their application. Simultaneously, treaties of funda-

ment of the Chinese People's Republic was not represented, while delegates of the Kuomintang (Taiwan) authorities were present; *United Kingdom Treaty Series*, No. 28/956/Cmd. 9815, p. 223; also *International and Comparative Law Quarterly*, 6 (1957), pp. 302–3.

<sup>1</sup> Lauterpacht, *op. cit.*, p. 375.

<sup>2</sup> Hudson, *loc. cit.*, p. 128.



mental importance, concerning problems of peace and war, have been and are binding States and governments *erga omnes* even though mutual recognition as between them all has not taken place or has been dispensed with.

In a world so varied as ours today the refusal to recognize a State or government has in most cases been the outcome of political differences and sometimes different criteria are applied to cases so similar that it would be difficult to justify the difference of approach. In a diverse world attempts to project particular moral principles as a basis for recognition and as something to be accepted by, and binding on, all, makes international co-operation more difficult. That road leads to pluralist theories of international law, to the suggestion that there exist more than one system of international law—which can only cause damage to the further development of peaceful relations between States.

We face today the waning legal importance of recognition. Of the three classical rights of States—the *jus legationum*, *jus belli ac pacis*, the *jus foederum ac tractatum*—the second has been limited, since war has been outlawed; the *jus foederum ac tractatum* has moved into first place, while the *jus legationum* has undoubtedly lost much of its traditional importance. Non-recognition based on political considerations has lost most of its meaning. It no longer produces all the effects it was meant to in the past. As to the future, an ever-growing number of problems will require the co-operation of an ever-growing number of States. Economic and technical progress, and the growing interdependence of nations and interests, make States and other entities which have lived hitherto only on the peripheries of international life enter it more fully. It would surely be wrong to identify the present situation and its many inadequacies—the division of the world, and the artificial walls still separating nations—with the general trend of historical development. The dialectics of history manifest themselves in the fact that while nations and States have come closer together than ever before, the gulf still seems so wide. However, material conditions and many other elements press for a rapprochement, for the recognition of the necessity of co-operation between different political systems. Since institutions of international law are but the reflex of history, they are produced by it and in turn influence its further course. That is why in the long run the institution of recognition will surely be more and more affected by the inevitable trend towards greater mutual understanding, and towards the adoption of principles and criteria reflecting the growing co-operation of States of different political and economic structure.

M. LACHS

# DECISIONS OF BRITISH COURTS DURING 1958-9 INVOLVING QUESTIONS OF PUBLIC OR PRIVATE INTERNATIONAL LAW

## A. PUBLIC INTERNATIONAL LAW<sup>1</sup>

### *Diplomatic immunity*

*In re C. (An Infant)*<sup>2</sup> was an application to the Chancery Division of the High Court by an employee of the Greek Embassy in London, the father of an infant, that proceedings begun by his wife (the stepmother of the infant) to make the child a ward of court be set aside on the ground of the diplomatic immunity of the father and the child.

An affidavit sworn by the father was put in evidence, showing that he was a Greek national, that his son, the infant, stayed with him for the school holidays and that he paid his son's school fees. Exhibited to the affidavit was a certificate from the Foreign Office showing that the father had been received by Her Majesty's Government in the United Kingdom as a clerk at the Greek Embassy and that he continued to be received in that capacity. His name was included in the list prepared under the Statute of 7 Anne, c. 12.

In the course of argument, counsel for the father asked the Judge, Mr. Justice Harman, to consider 'a statement emanating from the Foreign Office giving their view of the extent of diplomatic immunity'. His Lordship replied: 'I do not intend to take any notice of Foreign Office protocol in this respect, and I do not intend to be taught the common law of England by the Foreign Office.'<sup>3</sup> Subsequently, giving judgment, his Lordship said that he did not feel any doubt that the applicant was entitled to diplomatic immunity 'and, therefore, if that were all, I could not continue him as a respondent to the summons. It would however be an easy matter to add the infant as a respondent to the summons. . . . The question is whether I ought to take that course or whether the immunity which the father has claimed for himself extends to the infant his son. That turns, in the end, on a question of fact.' The Judge then reviewed the infant's life story and concluded:

'This court is quite used to dealing with foreign infants, and has jurisdiction over them while they are in this country, whatever their nationality, and it can and will deal with questions regarding their education. The question, however, raised here—and I think that it has never been raised before—is whether, first of all, the father is entitled, under the shield of diplomatic immunity, to reject the paternal jurisdiction of the Crown, exercised through the Court of Chancery. In my judgment, the answer to that question must be "Yes". I do not see why judicial jurisdiction is, so to speak, immune from diplomatic immunity.[4]

'The second question is whether the father's immunity extends to his son.

'By the Diplomatic Privileges Act, 1708, s. 3, the immunity or protection is thrown round

“any ambassador or other public minister of any foreign prince or state authorised and received as such by Her Majesty her heirs or successors or the domestic or domestic servant of any such ambassador or other public minister. . . .”

<sup>1</sup> © A. B. Lyons.

<sup>2</sup> *The Times* newspaper, 11 June 1958; [1958] 2 All E.R. 656; [1958] 3 W.L.R. 309; I am indebted to the Solicitors for the applicant for assistance in writing this Note.

<sup>3</sup> This exchange does not appear in either the *All England Reports* or the *Weekly Law Reports*.

<sup>4</sup> At this point, in [1958] 3 W.L.R., at p. 310, is added: 'In other words, if an ambassador's son were living in the embassy, the Court would and must refuse to interfere.'

Nothing express is said there about the family of the ambassador but I cannot doubt that the immunity extends to the family; Lord Phillimore made a speech to the House of Lords to that effect in *Engelke v. Musmann* ([1929] A.C. 433). After speaking of the ambassador's personal immunity, which he cannot waive, he says (*ibid.*, at p. 450):

"The ambassador further requires, in order that he may effectually do his Sovereign's business, that there should be a like immunity for his personal family, that is to say, his wife and his children if living with him, his diplomatic family, as it is sometimes called, that is to say, his counsellors, secretaries and clerks, whom I take to be intended by the word 'domestic' in the statute of Anne, and his ordinary servants, described in the statute as 'domestic servants' . . . ."

Lord Phillimore was of the opinion that "family" was used in the sense of what he called "personal family", i.e. wife and children living with the ambassador. I cannot doubt either that this immunity of the "personal family" extends to the "personal family" of the staff of the ambassador, and by "staff" I mean those included in the list which the Foreign Office accepts and for which there is a certificate in the present case. In 7 Halsbury's Laws of England (3rd Edn.), at p. 272 it is said: "The immunities of a diplomatic agent are extended to his family living with him"—that is because it is considered that the ambassador or his staff ought not to be harassed so as to disturb them in the important duties which they have to perform.

. . . Counsel for the father has drawn my attention to two recent statutes which deal, not with the staff of ambassadors, but with the staff of High Commissioners. The first is the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952. In that Act immunity from suit and legal process extends to what are called, in s. 1 (1) (c)

"members of the family of a chief representative or of a member of the official staff of a chief representative entitled to immunity. . . ."

That, says counsel, shows the view that the legislature took in 1952 of the extent of diplomatic immunity in these days. Similarly, in 1955, the Diplomatic Immunities Restriction Act, 1955, was passed which empowers Her Majesty to restrict the immunities of foreign diplomats in this country, in accordance with the constraint put on the immunities of our diplomats in foreign countries. It provides in s. 1 (1):

"If it appears to Her Majesty that the persona immunities conferred by law on the envoys of foreign sovereign Powers accredited to Her Majesty, their families and servants, and members of the official staff of such envoys and their families. . . ."

I ought to conclude that if this boy be regarded as a member of the family of his father, in the sense in which that word is used in Lord Phillimore's speech and the statutes above cited, he is also entitled to the immunity which the law throws over diplomatic representatives. . . .<sup>1</sup>

His Lordship discussed the question whether the father had abandoned his parental rights in respect of the child, and continued:

"I have come to the conclusion that the boy is a member of the family of the father and is a person to whom diplomatic immunity should be extended, just as it is to the father. He is, therefore, not a person whom I should add as a respondent to the summons. I therefore propose to set the proceedings aside."<sup>2</sup>

The first thing that might occur to one to ask about this case is, what was the 'statement emanating from the Foreign Office' which caused Mr. Justice Harman to make the remarks cited above? It appears that it was a printed document issued by the Protocol Department of the Foreign Office in September 1957 and entitled *Diplomatic and consular immunities and privileges. Memorandum describing the practice of Her Majesty's Government in the United Kingdom*. This is understood to be a document which is circulated to foreign embassies in London for information and not for purposes of litigation. On the cover of the document is printed: 'This memorandum is compiled for information only.

<sup>1</sup> [1958] 2 All E.R. at p. 657.

<sup>2</sup> *Ibid.*, at p. 659.



It does not commit Her Majesty's Government in any way, nor does it purport to constitute an authoritative statement of the legal position.<sup>1</sup>

The second point to be noted is that Mr. Justice Harman seems to have thought that the question whether or not the diplomatic immunity of the father—a member of the staff of an embassy—extended to his son was a question of fact. It is submitted, first, that only in a narrow sense is that correct—the question is one of law, of international law—and, secondly, that the question did not really arise.

It is well established<sup>2</sup> that members of a legation, including clerks,<sup>3</sup> are entitled to exemption from the civil jurisdiction of the receiving State. The wife and children of an ambassador are entitled to similar exemption,<sup>4</sup> as noted by Lord Phillimore in his speech in *Engelke v. Musmann*, cited above. But Mr. Justice Harman in the present case 'could not doubt' that the immunity of the family of the ambassador extended to the family of the staff of the ambassador. In support of his view, he quoted from two Acts of Parliament, one of 1952 which extended immunity from suit and legal process to members of the family of the official staff of a chief representative of a Commonwealth country, and one of 1955 which speaks of personal immunities conferred by law on (*inter alia*) families of members of the official staff of envoys of foreign sovereign powers accredited to Her Majesty. It might be objected by the captious that the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, did not confer immunities on diplomats or their staffs or the families of either, and still less did the Diplomatic Immunities Restriction Act, 1955, confer immunities on anyone; but the fact is that in 1952 Parliament clearly thought that families of the staff of an envoy were entitled to immunity from suit and legal process and in 1955 that 'personal immunities' were conferred by law on the families of the official staffs of diplomats. On the basis of this notion, expressed in two statutes, Harman J. held that a member of the family of a member of the staff of a legation was entitled to diplomatic immunity *quoad* the courts of the receiving State. Two observations require to be made on this decision. First, that prior to and apart from the two statutes in question, there is remarkably little authority on the point. Of the modern writers, virtually none would extend what may be called 'family immunity' beyond the ambassador himself; Satow, it is true, goes so far as 'the wives and families of clerks',<sup>5</sup> but Satow is not on legal matters a writer of prime authority, and we have to go back to Westlake, writing in 1910, for a statement that 'Besides the persons who are on the diplomatic staff of the mission, immunity from the territorial jurisdiction, civil or criminal, is generally enjoyed by those who are living with them as part of their family or household'<sup>6</sup>—and 'generally enjoyed' seems to connote something less than entitlement.<sup>6</sup>

<sup>1</sup> See Oppenheim, *International Law* (ed. by Lauterpacht), vol. 1, §§ 401 and 402; Satow, *A Guide to Diplomatic Practice* (4th ed., 1957), p. 192.

<sup>2</sup> Cf. *Assurance Compagnie Excelsior v. Smith* (1923), 40 T.L.R. 105—chief of the mail department of the American Embassy in London.

<sup>3</sup> See Oppenheim, *op. cit.*, § 404; Hall, *International Law* (7th ed., 1917), p. 188.

<sup>4</sup> *Op. cit.*, p. 193.

<sup>5</sup> *International Law*, Part I (1910), p. 280.

<sup>6</sup> The Pan-American Convention signed at Havana on 20 February 1928 provides in Article 14 for the 'inviolability' of (b) the entire official personnel of the diplomatic mission and (c) the members of the respective families living under the same roof. And see this *Year Book*, 34 (1958), pp. 372-3, as to the doubtfully established exemption from inquest of a member of the family of one of the staff of an embassy. See also the 'Draft Articles on Diplomatic Intercourse and Immunities' of the International Law Commission, of which Article 36, *Persons entitled to privileges and immunities*, mentions, in para. 1, members of a diplomat's family:

'Apart from diplomatic agents, the members of the family of a diplomatic agent forming part of his household, and likewise the administrative and technical staff of a mission, together with the members of their families forming part of their respective households, shall, if they are not nationals of the receiving state, enjoy the privileges and immunities specified in Articles 27 to 34.' *Commentary*, para. 11: 'In the case of diplomatic agents and the administrative and technical staff, who enjoy full privileges and immunities, the Commission has followed current practice by proposing that the members of their families should also enjoy such privileges and immunities, provided that they form part of their respective households and are not nationals.'

The *Annual Digest of Public International Law Cases*, now *International Law Reports*, a series covering the period from 1919 almost to the present, provides no case<sup>1</sup> in which immunity from jurisdiction was granted to a member of the family of one of the staff of a legation; but there is the case of *Carrera v. Carrera*,<sup>2</sup> the facts in which bear important resemblances to those in *In re C. (An Infant)*. In *Carrera v. Carrera* the wife of a domestic servant in the Czechoslovakian Embassy at Washington sued her husband, in the District Court for the District of Columbia, claiming maintenance for herself and custody of their daughter. The Court of Appeals for the District of Columbia Circuit, affirming the decision of the District Court, held that the defendant was immune from suit. In the course of its judgment the Court said: 'It has long been a settled rule of law that foreign diplomatic representatives are exempt from all local processes in the country to which they are accredited. I Kant's Commentaries, 15, 38. The same immunity is not only given to an ambassador himself, but to his subordinates, family and servants as well. 27 Harv. L. Rev. 489 (1914). See also 27 Yale L. J. 392 (1917).' The Court rejected a submission that the process against the defendant was founded upon a debt contracted before he entered upon the service of the Ambassador, in that the child for whom support was sought was born before he began to serve the Ambassador (§ 254, Title 22 of the United States Code permitting an action against a minister's domestic with respect to a debt contracted before such service), observing that a parent's obligation to support his infant child 'is not usually considered a debt within the ordinary significance of that word'; and also rejected, but without giving any reasons, the interesting contention that 'the rule of diplomatic immunity does not apply in the field of domestic relations'. It will be seen that in *Carrera v. Carrera* the Court dealt with a claim for the custody of a child from the point of view of the immunity from process of the child's parent. It is submitted that this is the correct view, that in *In re C. (An Infant)* Harman J. broke fresh ground and that he did so unnecessarily. He had before him the unchallenged evidence that the father of the child was entitled to diplomatic immunity; proceedings to make the child a ward of court had been commenced against the father; and it would have been sufficient to set them aside on the ground of the father's immunity. There was no need to go any further than this and decide the question whether the child himself was entitled to immunity.

*In re C. (An Infant)* was heard in June 1958. By a coincidence, about the same time the topic of the immunity of the families of diplomatic staff appeared twice in the public press. On 3 April 1958 an answer was given in the House of Commons on behalf of the

of the receiving state. The Commission did not feel it desirable to go farther and lay down a criterion for determining who should be regarded as a member of the family, nor did it desire to fix an age limit for children. The spouse and children under age, at least, are universally recognised as members of the family, but in some cases other relatives may also be regarded as qualifying as "members of the family" if they are part of the household. In making it a condition that a member of the family wishing to claim privileges and immunities must form part of the household, the Commission intended to make it clear that close ties or special circumstances are necessary qualifications. Such special circumstances might exist where a relative kept house for an ambassador, although she was not closely related to him; or where a distant relative had lived with the family for many years, so as, in effect to become a part of it.'

Members of families are also mentioned in Article 31, *Exemption from social security legislation*:

'The members of the mission and the members of their families who form part of their households, shall, if they are not nationals of the receiving state, be exempt from the social security legislation in force in that state except in respect to servants and employees if themselves subject to the social security legislation of the receiving state. This shall not exclude voluntary participation in social security schemes in so far as this is permitted by the legislation of the receiving state.'

(U.N. General Assembly *Official Records*, 13th Session, Supp. No. 9 (A/3859); *American Journal of International Law*, 53 (1959), pp. 230, 253, 281, 283, 277).

<sup>1</sup> *Ex parte Cheuk Gar Lim* (285 Fed. 396; *Annual Digest*, 1919-22, Case No. 204) concerned 'the minor son of an accredited Chinese official who had been admitted to the United States', but the case itself decided nothing.

<sup>2</sup> 174 F. 2d 496; *International Law Reports*, 1949, p. 288.

Secretary of State for Foreign Affairs to a request to 'state the principles governing the grant of diplomatic immunity in the United Kingdom, the classes of persons eligible to enjoy such immunities . . .'. In reply, it was stated:

'It is a basic and traditional principle of international law that an accredited diplomatic representative is entitled to the protection of diplomatic immunity in order that he may discharge his mission with the necessary freedom and independence, and that this immunity should be extended also to such a reasonable number of his suite as may be necessary to assist him in his duties. This principle is accepted and applied by Her Majesty's Government in common with most other States.

'In accordance with the provisions of the Diplomatic Privileges Act, 1708, 7 Anne Cap. 12, a list is maintained in the Foreign Office of the names of those persons who are officially regarded as entitled to claim full diplomatic immunity in the United Kingdom. Her Majesty's Government include in the list the names of Heads of diplomatic Missions and the names of the members of their diplomatic staffs. In addition, the names of any other officials performing clerical or similar duties at a diplomatic Mission are customarily included in the list. . . .

'The jurisdictional immunities described [immunity from arrest and detention and from suit and legal process] are customarily regarded as extending to the wife of a Head of Mission or of a member of his official staff and also to those members of their families who are dependent upon them. The personal inviolability of the Head of a diplomatic Mission and of his suite and their families is fully recognised by Her Majesty's Government.

'In the light of the conclusion expressed in the Report on Diplomatic Immunity made in 1951 by the Inter-departmental Committee under the Chairmanship of Lord Justice Somervell that the immunities ordinarily granted by Her Majesty's Government "are either certainly or probably required by international law", my right hon. and learned Friend is satisfied that the standard practice of Her Majesty's Government in this matter is reasonable.<sup>1</sup>

On 9 April 1958 *The Times* newspaper reported that the British Ambassador in Athens had asked the Greek Government to examine whether under international law the privilege of diplomatic immunity should not be extended to Mr. R. Johnson, the son of the military attaché in Athens, in respect of a charge of manslaughter arising out of a motor-car accident in which he had been involved. Mr. Johnson had not been immediately arrested, as the police thought that he was covered by his father's diplomatic immunity. According to *The Times*' Athens correspondent: 'There is some uncertainty in Greek law with regard to the validity of this privilege for members of diplomats' families'. The following day, it was reported that the Public Prosecutor had decided that Mr. Johnson might be charged with manslaughter. 'Legal experts at the Greek Foreign Ministry and at the Foreign Office in London were trying earlier today to work out how far the members of diplomats' families are entitled to the privilege of immunity in foreign countries.' The case turned on the question whether Mr. Johnson was legally domiciled with his father, with whom he was spending the Easter vacation in Athens. To this report, *The Times*' diplomatic correspondent added: 'The Greek code of criminal procedure is not clear. It includes among those immune heads of missions and their families . . .' and other persons who enjoy immunities 'in virtue of treaties or international usage commonly accepted'. Eventually, legal experts of the Greek Foreign Ministry decided that Mr. Johnson 'cannot benefit from his father's immunity', and he was charged with manslaughter by negligence.<sup>2</sup> It would appear from all this that in April 1958 the 'legal experts at the Greek Foreign Ministry' overbore, as being contrary to 'international usage commonly accepted', the official view of Her Majesty's Government relating to the immunity of families of diplomatic staff as expressed in Parliament the previous

<sup>1</sup> *Hansard*, vol. 585 (written answers), cols. 200-1.

<sup>2</sup> See *The Times* newspaper, 9, 10 and 11 April and 17 August 1958.



February, while in June of that year Mr. Justice Harman in the Chancery Division of the High Court of Justice in England gave effect to the implications of that view.

A. B. LYONS

## B. PRIVATE INTERNATIONAL LAW<sup>1</sup>

### *Recognition of foreign divorces*

*Case No. 1.* The decision of Karminski J. in *Robinson-Scott v. Robinson-Scott*<sup>2</sup> elaborates the significance of that of the Court of Appeal in *Travers v. Holley*.<sup>3</sup> It does so in at least two ways. The first, although based upon what is possibly a misconception, is interesting; the second is important.

The learned judge said of *Travers v. Holley*:

'In that case the court of Appeal had to consider the validity of a decree of dissolution on the ground of desertion pronounced by the courts of New South Wales. The Court of Appeal held, by a majority, that the husband had acquired, at the material date, a domicile of choice in New South Wales, and that the courts of that State had therefore jurisdiction on that ground to entertain the wife's suit. But the court also held unanimously that, as both the courts of New South Wales and of England claimed the same jurisdiction under section 13 of the Matrimonial Causes Act, 1937, and by section 16 (a) of the New South Wales Matrimonial Causes Act, No. 14, 1899, respectively, it would be wrong for the English courts to refuse to recognize a jurisdiction which *mutatis mutandis* they claimed for themselves. It is clear that the Court of Appeal decided this case on two grounds, and that, therefore, their decision on the second point cannot be treated as *obiter dicta* but as a material part of their decision (see *Jacobs v. London County Council*, [1950] A.C. 361, *per* Lord Simonds: "... there is, in my opinion, no justification for regarding as *obiter dictum* a reason given by a judge for his decision, because he has given another reason also").'<sup>4</sup>

It is submitted with respect that this analysis is open to question and that what Karminski J. regards as a second ground for the decision in *Travers v. Holley* was in fact the sole ground. The majority of the Court of Appeal did find that the couple had acquired a domicile of choice in New South Wales at the time of the desertion, but there seems to have been no finding that this domicile was subsisting at the time of the New South Wales proceedings. Of this Somervell L.J. said: 'I express no opinion on these matters because it is unnecessary in my view to decide them.'<sup>5</sup> Hodson L.J. said: 'It is not, I think, necessary to form any conclusion as to when the husband abandoned his domicile of choice in Australia, since I think that even if he had done so at some time before the date of the institution of the New South Wales proceedings, and after the date of the desertion, the husband's contention fails.'<sup>6</sup> In this absence of a finding that the parties were domiciled in New South Wales at the time of the institution of the proceedings, the Court of Appeal's recognition of the decree must have depended solely upon its recognition of the New South Wales Court's assumption of jurisdiction by virtue of the New South Wales Matrimonial Causes Act, No. 14, 1899, s. 16 (a). The only significance of the finding of a domicile of choice in New South Wales was for the purpose of bringing the case within the statute. Thus it is domicile at the time of the desertion that is relevant. Domicil at the time of the institution of the proceedings is in this context immaterial, and the question of its determination was accordingly left open in *Travers v. Holley*.

The second and more important aspect of the *Robinson-Scott* decision is that it establishes that the test of reciprocity is the factual position and not the jurisdictional requirement. In other words, the true rule in *Travers v. Holley* is not that an English court will recognize a foreign divorce decree when the rule by virtue of which the foreign court assumed jurisdiction is similar to a rule which would confer jurisdiction on an

<sup>1</sup> © P. B. Carter.

<sup>4</sup> [1958] P. 71, 84.

<sup>2</sup> [1958] P. 71.

<sup>5</sup> [1953] P. 246, 250.

<sup>3</sup> [1953] P. 246.

<sup>6</sup> *Ibid.* 255.

English court, but rather that an English court will recognize a foreign divorce decree wherever the foreign court assumed jurisdiction in circumstances similar to those in which an English court would assume jurisdiction. It is the facts of the case not the content of the jurisdictional rule which must be investigated.

In *Robinson-Scott v. Robinson-Scott* a husband was at all material times domiciled in England. His Swiss wife had obtained a decree of divorce in the District Court of Zürich, the court assuming jurisdiction on the basis that the wife had, in the circumstances, acquired a separate domicile from that of her husband and that her domicile was in the canton of Zürich. The husband petitioned in England for a declaration that the marriage had been validly dissolved by the Swiss decree. Karminski J. said, 'It is clear that, in the present case, there can be no question of the Zürich courts exercising a jurisdiction *mutatis mutandis* on the same basis as the English courts, since the jurisdiction of the Zürich court was based on a concept of domicile wholly unrecognised by English law.'<sup>1</sup> The learned judge nevertheless recognized the Swiss decree. He was able to do so because the wife had in fact lived in the canton of Zürich for at least three years immediately preceding the commencement of the Swiss proceedings. He said:

'where, in fact, there has been three years' residence by a wife in the territory of the foreign court assuming jurisdiction in a suit for dissolution, the English court should accept that as a ground for exercising jurisdiction, because it would itself accept jurisdiction on proof of similar residence in England. It is not essential for recognition by this court that the foreign court should assume jurisdiction on the grounds laid down by section 18 of the Matrimonial Causes Act, 1950. It is sufficient that facts exist which would enable the English courts to assume jurisdiction.'<sup>2</sup>

This crystallization of the *Travers v. Holley* doctrine means, for example, that the Florida divorce decree in *Dunne v. Saban*<sup>3</sup> would have been recognized had the wife in fact been resident in Florida for three years or more immediately preceding her institution of proceedings there. In *Dunne v. Saban* Davies J. refused to apply the *Travers v. Holley* rule. The husband was domiciled in England at the time of the Florida proceedings. Jurisdiction was assumed by the Florida court on the grounds of 90 days' residence and domicile, the wife being able to acquire a separate domicile under the law of Florida. As the wife had in fact been resident in Florida for only about two years, *Dunne v. Saban*, as a decision, is unaffected by *Robinson-Scott v. Robinson-Scott*. On the other hand, such observations of Davies J. as the following would appear to require qualification.

'Where, as here, you find a court purporting, no doubt completely properly according to the laws of Florida, to exercise jurisdiction upon 90 days' residence, even though that is coupled with something that we do not recognize, namely, a separate domicile of the wife in the United States, the only possible answer which this court can give is to say that the decree of that foreign court was in our law invalid.'<sup>4</sup>

But *Robinson-Scott v. Robinson-Scott* establishes that it is not the reason for the foreign court's assumption of jurisdiction that is crucial, but the nature of the facts. That the foreign court exercised jurisdiction upon 90 days' residence will not prevent recognition if on facts analogous to the actual facts of the case an English court would have exercised jurisdiction.

Given the doctrine of reciprocity enunciated in *Travers v. Holley*, it seems right in principle and advantageous in practice that the test of reciprocity should be the factual position and not the jurisdictional requirement. It is fundamental to the conflict of laws that a connecting factor be interpreted in accordance with the notions of the *forum*. The rule that an English court will recognize decrees of the courts of the domicile means that it will recognize decrees of the courts of the country in which the parties were domiciled in the English sense. Whether the parties were domiciled there in any other sense and the nature of the ground upon which the foreign court assumed jurisdiction are both immaterial. So, too, when the connecting factor is not domicile but, for example, what for

<sup>1</sup> [1958] P. 71, 84-85.

<sup>2</sup> *Ibid.* 88.

<sup>3</sup> [1955] P. 178.

<sup>4</sup> *Ibid.* 190.

brevity's sake may be called three years' residence, the relevant inquiry is whether or not on the facts this connexion as defined by English law is present. The nature of the ground upon which the foreign court assumed jurisdiction is immaterial for the same reasons as it is immaterial in cases in which domicile is the connecting factor.

The practical convenience of this view is obvious. It involves an investigation of facts for the purpose of the hypothetical application of a domestic and therefore familiar rule. If the test of reciprocity were the jurisdictional requirement, there would be involved, first an investigation of foreign law, and secondly a determination of the necessary degree of similarity between the foreign and English jurisdictional rules. It is improbable, except in cases of conscious reproduction, that there will be precise similarity. The matter would be one of degree and this makes for uncertainty. Uncertainty is particularly undesirable in questions of matrimonial status.<sup>1</sup>

*Case No. 2.* In *Manning v. Manning*<sup>2</sup> Mr. Commissioner Latey followed *Robinson-Scott v. Robinson-Scott*. A wife, domiciled in England, obtained in Norway a Norwegian divorce decree based upon a period of separation. The Norwegian court assumed jurisdiction on the ground that the last common residence of the parties had been in Norway. But the learned Commissioner recognized the decree. He did so because the wife had in fact been ordinarily resident in Norway for a period of three years immediately preceding the commencement of the proceedings there.

*Manning v. Manning*, like *Robinson-Scott v. Robinson-Scott*, was a case in which reciprocity in the factual position was held to be enough for the operation of the *Travers v. Holley* doctrine. It is made clear at the same time that, not only is such reciprocity enough, but also it is essential. In the earlier case of *Arnold v. Arnold*<sup>3</sup> Mr. Commissioner Latey suggested *obiter* that a foreign divorce decree ought to be recognized 'if in fact there had been, say, two years' residence [of the wife in the foreign country immediately preceding the proceedings] or more, or even less, and the residence is genuine and *bona fide* and not merely for the purpose of getting a divorce in a convenient court'.<sup>4</sup> This view was expressly rejected by Karminski J. in *Robinson-Scott v. Robinson-Scott*.<sup>5</sup> In *Manning v. Manning* Mr. Commissioner Latey said that he was 'content to follow the principle which Karminski J. had laid down, that is, that there must be at least three years' residence to found jurisdiction wherever the action is brought'.<sup>6</sup>

The doctrine of *Travers v. Holley* is based upon notions of reciprocity and comity. One important aspect of this has been clarified by the decisions in the *Robinson-Scott* and *Manning* cases. Inferential allusion was also made to two other features of the operation of these notions in the context of the *Travers v. Holley* principle.

In *Travers v. Holley* itself the New South Wales divorce was based upon desertion, a ground known to English law. So, too, in *Carr v. Carr*,<sup>7</sup> in which Barnard J. followed *Travers v. Holley*, the Northern Irish divorce was based upon desertion. Again, in *Arnold v. Arnold*, although the Finnish divorce was based upon desertion for one year, the husband was found in fact to have been in desertion for ten years. In *Robinson-Scott v. Robinson-Scott*, however, the Swiss Court had granted a divorce under Article 142 of the Swiss Civil Code on the ground that the matrimonial relations between the parties were deeply and irreparably disrupted. In *Manning v. Manning* the Norwegian Court granted a divorce on the ground of mutual separation. In both these two latter cases it was held that the fact that the grounds of the foreign divorce were unknown to English domestic law was immaterial. Mr. Commissioner Latey in the latter case said: 'on this question of grounds for divorce it should be taken as an established principle that the ground of a divorce in the *lex fori* need not be taken into consideration in cases of this kind, so long as it does not offend against natural justice as conceived in the English court'.<sup>8</sup> This principle is, of course, precisely consistent with that operating when the

<sup>1</sup> Some other aspects of *Robinson-Scott v. Robinson-Scott* can usefully be considered in conjunction with the later case of *Manning v. Manning* (Case No. 2 below).

<sup>2</sup> [1958] P. 112.

<sup>3</sup> [1957] P. 237.

<sup>4</sup> *Ibid.* 253.

<sup>5</sup> [1958] P. 71, 87.

<sup>6</sup> [1958] P. 112, 120.

<sup>7</sup> [1955] 1 W.L.R. 422.

<sup>8</sup> [1958] P. 112, 121-2.



foreign decree is pronounced by the court of the domicile. Choice of law and the content of the chosen law are immaterial in problems of recognition. It is to be noted that the notion of reciprocity operating here is, therefore, in a sense a partial one. It enables English courts to recognize a foreign dissolution pronounced, for example, for mental cruelty or by consent of the parties, because in analogous jurisdictional circumstances an English court would have had jurisdiction to dissolve the marriage not necessarily on the actual facts of the case but *if* the facts had been such as to show a ground for divorce known to English law. It might be argued that this brand of reciprocity is too crude; that the question should not be simply would English courts assume jurisdiction in these circumstances, but rather would English courts grant a divorce in these circumstances. But in recognizing decrees of the courts of the domicile English courts have taken no account of choice of law or the content of the chosen law. Consistency has required that this approach be adopted in relation to the recognition of foreign divorces pronounced by courts other than those of the domicile.

In *Manning v. Manning* Mr. Commissioner Latey, in the course of his summary of the evidence of the expert witness on Norwegian law, remarked:

'He further informed me, with regard to a hypothetical converse position that if a man were domiciled according to the English conception in Norway and his wife came to England, and if she had lived here for three years or more, and she satisfied the English court that her husband had deserted her for upwards of three years, and she was granted a divorce here, that in such case the Norwegian court would recognize the English decree as valid.'<sup>1</sup>

This evidence is not again referred to and its significance (if any) in the case is not clear. It has never been suggested that English courts should not recognize a foreign decree unless in analogous circumstances the foreign court would recognize an English decree. To introduce such a limitation upon the English recognition of foreign decrees would reflect the operation of a more complete notion of reciprocity. It is, however, a limitation which is unknown in the English law relating to the recognition of decrees of the courts of the domicile, and its introduction into cases of recognition under the *Travers v. Holley* doctrine would constitute an inconsistency.

One final and quite different point may be made about the *Robinson-Scott* and *Manning* decisions. Recently hopes ran high that a wife would be enabled to have a domicile separate from that of her husband.<sup>2</sup> Had this long overdue reform in the law taken place, there would seem to be little justification for the retention of the legislation which gives English courts jurisdiction in some cases in which the petitioner is not domiciled here. The repeal of this legislation would in its turn lead to the elimination of the *Travers v. Holley* doctrine. The result of all this would not be to change the outcome of such cases as *Robinson-Scott v. Robinson-Scott* and *Manning v. Manning*. It seems clear on the facts of both these cases that the wife would be regarded as having acquired (or retained) a domicile in Switzerland and Norway respectively. However, the advantages which the reforms outlined above would have over the present piecemeal mitigation provided by the Matrimonial Causes Act, 1950, section 18, and the engrafted *Travers v. Holley* doctrine may easily be illustrated.

Suppose that a wife domiciled with her husband in England wishes to obtain a divorce on some ground unknown to English law, e.g. mental cruelty. If she takes up residence for three years in, and then obtains a decree from the courts of, a country in which divorce on this ground is easy, that divorce will, under the present law, be regarded as valid. This will be so even if she never intended to remain permanently or even indefinitely in the country in question, and even if she in fact returns to England immediately after obtaining her decree. Provided she has the means, the time and the inclination to reside abroad for three years, an English wife can under the present law reap the benefits of what is realistically speaking an evasion of English domestic law. The present law does

<sup>1</sup> [1958] P. 112, 118.

<sup>2</sup> See Domicile Bill, 1959.

not incidentally, extend similar facilities to a husband. If the law were reformed along the lines outlined above, the wife would be put in the same position as the husband, and the foreign divorce would be accepted as valid in England only if she were found to be domiciled, albeit separately, in the foreign country at the time.

Conversely, suppose the wife did intend to remain in the foreign country permanently, but she obtained the decree, say, only two years after taking up residence there. Under the present law the divorce would not be recognized. This will be so even if she in fact remains in the country in question for the rest of her life. It will mean that any further marriage into which she may enter will be regarded as invalid, and the children of such marriage will be regarded as illegitimate. Under the suggested reforms, the wife's divorce would be recognized as valid as she would have obtained a domicile of choice in the country where the decree was pronounced.

The point is that, as a connecting factor for divorce jurisdictional purposes, a period of residence is less satisfactory than domicile, sometimes because it is too generous, and sometimes because it is too strict. It may facilitate 'resorting' to the jurisdiction. Or it may be hard on the person, with a *bona fide* (and perhaps in the long run implemented) intention to remain, who obtains the divorce before three years have elapsed.

*Case No. 3.* In *Mountbatten v. Mountbatten*<sup>1</sup> the problem of possible interaction between the doctrine of *Travers v. Holley* and the rule in *Armitage v. Attorney-General*<sup>2</sup> was posed. Davies J. found such interaction to be non-existent. The relevant facts were these. A husband and wife married in 1950 and lived together in New York. The husband throughout retained his English domicile of origin. In 1952 he returned to England and he alleged that his wife refused to follow him. In 1954 the wife obtained a divorce in the State of Chihuahua in Mexico. The Mexican court assumed jurisdiction on two grounds, that the wife was resident within the jurisdiction, this meaning physically present, and that both parties had submitted to the jurisdiction. The ground of the divorce was incompatibility of temperament. Expert evidence was accepted that this decree would be recognized in New York. Apart from her brief visit to Mexico, the wife was ordinarily resident in New York from 1950 until the date of the English proceedings, in which the husband prayed the court for a declaration that his marriage had been validly dissolved by the Mexican decree. The substance of the contention for the husband was as follows. The New York Court was the court of residence of the wife and she had been more than three years ordinarily resident within its jurisdiction. Had the New York Court itself pronounced the decree, it would be accepted as valid in England under the rule in *Travers v. Holley*. Again, if the parties were domiciled in a country where the Mexican decree would be recognized, it would be accepted as valid in England under the rule in *Armitage v. Attorney-General*. *Travers v. Holley* renders three years' residence by the wife equivalent to domicile. *Armitage v. Attorney-General* renders recognition equivalent to pronouncement. Recognition by the courts of three years' residence by the wife should therefore be treated in the same way as pronouncement by that Court and as recognition by the courts of the domicile.

Davies J. rejected this contention and refused to recognize the validity of the Mexican divorce.

The learned judge expressed some doubt as to whether at the moment of obtaining the Mexican decree the wife retained her New York ordinary residence. Distinguishing 'accidental or casual breaks in a period of ordinary residence—for example, breaks for the purpose of business or holiday', he said: 'Here we have a case of a woman who quite deliberately, with the knowledge and consent of her husband, left the place where she was ordinarily resident, went abroad and obtained a certificate of residence in a foreign country in order to give jurisdiction to the courts of that country.'<sup>3</sup> But it is to be remembered that the Mexican certificate of residence showed little more than physical presence, that the wife was in fact in Mexico for only a very short time, and that she

<sup>1</sup> [1959] 2 W.L.R. 128.

<sup>2</sup> [1906] P. 135.

<sup>3</sup> [1959] 2 W.L.R. 128, 150.

returned to New York. In these circumstances it is respectfully submitted that the learned judge's doubts on this score might have been resolved.

Davies J. expressed some dissatisfaction with the width of the rule in *Armitage v. Attorney-General* as usually formulated. He suggested that its operation is limited to cases in which the reason why the courts of the domicile would recognize the decree is that it was 'pronounced by a court in the jurisdiction of which the wife had obtained a separate domicile'.<sup>1</sup> It is not clear whether the learned judge here means 'domicil' as understood in the courts of the country in which the husband is domiciled in the English sense, or whether by 'domicil' he means domicile in the English sense (but ignoring the unity of matrimonial domicile rule). If by 'domicil' he means the former, the proposition is that, if the court of the husband's domicile uses the word 'domicil' when recognizing the decree, the *Armitage* principle operates, but if it uses some other word, it does not operate. This can scarcely be the law. If, however, by 'domicil' Davies J. means domicile in the English sense, the actual decision in *Armitage v. Attorney-General* would seem to be impugned because there appears to have been no finding that the wife there ever obtained a domicile in the English sense in South Dakota.<sup>2</sup>

For the purpose of his decision in *Mountbatten v. Mountbatten* Davies J. did not rely upon his doubts as to whether the wife was still ordinarily resident in New York at the time of the Mexican proceedings. Nor did he rely upon the narrow interpretation of the *Armitage* decision which he favoured, 'But despite this, it is right, in my opinion, that as a judge of first instance I ought to act upon the interpretation of *Armitage v. Attorney-General* which has been current and accepted for the last 50 years.'<sup>3</sup> He decided that, even if the wife was ordinarily resident in New York for three years immediately preceding the commencement of the Mexican proceedings and even accepting the wide interpretation of *Armitage v. Attorney-General*, although an English court would have recognized Lady Milford Haven's decree had it been actually pronounced in New York, it could not be recognized simply because it would be regarded as valid in New York.

The approach of the learned judge is that the exclusive operation of the law of the domicile is still paramount. The exceptions to this which the legislature created has must be narrowly construed.

'It is, as I think, important to note the provisions of section 18 (3), which seem to indicate that these special provisions are exceptions to the general rule and that apart from express statutory provisions the principle and the law of the domicile are still paramount.'<sup>4</sup>

Again:

'In my judgement, it necessarily follows that this court will not recognize decrees which are not recognized by the court of the domicile, except, of course, decrees pronounced by this court itself in favour of a wife in the exercise of its jurisdiction under section 18 of the Act of 1950, and similar legislation and decrees pronounced by foreign courts in strictly analogous circumstances. Subject to those exceptions, the court of the domicile is still, in our law, the paramount authority. To the extent of those exceptions this court will recognize a decree pronounced by a court other than the court of the domicile. But apart from those exceptions there is nothing in the authorities which compels or indeed permits this court to recognize a decree which is neither pronounced by nor directly recognized by the court of the domicile.

<sup>1</sup> [1959] 2 W.L.R. 128, 149.

<sup>2</sup> When Mrs. Gillig went to South Dakota, one of her objects in doing so was to institute proceedings there for divorce. She did this little more than three months later. Within a year she married a domiciled Englishman and settled in the State of Colorado. Although, when she went to South Dakota, she had decided to quit England and to establish herself in America, it is not at all clear that she had decided to establish herself in any particular law district. Pending this she could not acquire a new domicile in the English sense even if she was unmarried.

<sup>3</sup> [1959] 2 W.L.R. 128, 149.

<sup>4</sup> *Ibid.* 146-7.



'This court is in the present case the court of the domicile. As such, it does not recognize the Mexican decree. It is, in my judgement, impossible to hold that a decree to which this court would not give direct recognition is owing to the interposition of a residential qualification of the wife in a third State entitled on account of such residential qualification to be recognized here.

'The proposition advanced for the husband is that the test for recognition is now a dual one. Is the decree valid either by the law of the domicile or by the law of the place in which we recognize that the wife is concurrently entitled to proceed? If the answer to either of these questions is in the affirmative, then, it is said, the decree is entitled to recognition here. The proposition is, in my judgment, a wholly illegitimate extension of the principle of comity upon which the case of *Travers v. Holley* and the subsequent cases turn. It is not difficult to frame an example to illustrate the impossibility of such an extension. Suppose a husband and wife domiciled in, say, Victoria, Australia. The wife goes off to New York and ordinarily resides there for over three years. She then goes to Mexico and obtains a decree there in similar circumstances to those in which the present wife obtained her decree. That Mexican decree is not recognized by the courts of the domicile, Victoria, but is recognized by the courts of the wife's residence, New York. In subsequent proceedings in the English courts the validity of the Mexican decree is called in question—for example, in proceedings as to legitimacy or inheritance after a subsequent marriage of one of the parties. This court would be faced with the position that the Mexican decree was not recognized by the court of the domicile but was recognized by the court of the wife's residence. Can it possibly be doubted that this court would hold, following the court of the domicile, that the decree was not entitled to recognition?'<sup>1</sup>

It is submitted with great respect that consideration of the paramountcy of exclusive control by the law of the domicile, although obviously pertinent to an evaluation of the doctrine of *Travers v. Holley*, should have carried little weight in dealing with the problem posed in the *Mountbatten* case. *Travers v. Holley* is judge-made law, as indeed is *Le Mesurier v. Le Mesurier*.<sup>2</sup> Once it is accepted that a connecting factor other than domicile will promote recognition, arguments based upon the paramountcy of domicile cease to be in point. Of course, they would be in point if an attempt were made to widen the alternative connecting factor or to introduce new alternative connecting factors. But no attempt of this sort was being made in *Mountbatten v. Mountbatten*. The connecting factor—three years' residence by the wife immediately preceding the proceedings—was exactly the same as in *Travers v. Holley*. The only question was as to whether English courts should differentiate between decrees valid in a country so connected on account of their being actually pronounced there, and those valid because they would be recognized there. This is a distinction which is not drawn when the connecting factor is domicile, and should not, it is submitted, be drawn whatever the connecting factor.

It is suggested that the real force of Davies J.'s reasoning strikes at *Travers v. Holley* itself rather than any 'extension' of it. A variation upon the learned judge's example illustrates this. Supposing the wife in that example had, after three years' ordinary residence in New York, obtained a decree in New York itself. In subsequent proceedings in the English courts exactly the same dilemma would arise as in the case put. The New York decree would not be recognized in the courts of the domicile (Victoria) but would, of course, be valid in the courts of the wife's residence. Presumably it would be recognized in England under the doctrine of *Travers v. Holley*, notwithstanding its invalidity by the law of Victoria. If, on the other hand, *Travers v. Holley* would be distinguished on the grounds that there, and in all the cases following it, the couple was domiciled in England, so it would be distinguished on the same grounds in the hypothetical case put by Davies J.

Many of the rules relating to the recognition of decrees by reference to domicile have been carried into the area of decrees recognized by reference to alternative connecting factors under *Travers v. Holley*. The connecting factor is interpreted according to English

<sup>1</sup> [1959] 2 W.L.R. 154-5.

<sup>2</sup> [1895] A.C. 517.

notions, i.e. the reason why the foreign court purported to assume jurisdiction is immaterial. This was settled in *Robinson-Scott v. Robinson-Scott* which was followed in *Manning v. Manning*. The grounds upon which the foreign court grants the divorce are immaterial: this too was settled in the *Robinson-Scott* case, was followed in the *Manning* case, and was expressly reiterated by Davies J. in *Mountbatten v. Mountbatten*.<sup>1</sup> But one rule has not been carried through in this way: if the connecting factor is not domicile, validity on account of recognition is not equated to validity on account of actual pronouncement. This is the effect of *Mountbatten v. Mountbatten*.

#### *Succession to immovables*

*Case No. 4.* Dr. Cheshire writes: 'It must be conceded that the object of every court in the civilized world, when dealing with a will, is first to ascertain the intention of the testator and then to give effect to that intention so far as is consonant with the governing law.'<sup>2</sup> At the same time it is a rule firmly embedded in private international law that 'the *lex situs* is the governing law for all questions that arise with regard to immovable property'.<sup>3</sup> Obviously the interaction of the two principles may fall to be considered in cases involving testamentary disposition of immovables situated abroad. This happened in *Philipson-Stow v. Inland Revenue Commissioners*.<sup>4</sup>

By section 28 (2) of the Finance Act, 1949, property passing on the death of a person 'shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if . . . the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of Scotland and . . . (c) that the property . . . is by the law of the country in which it is situate, immovable property.'

A testator domiciled in England made a will in English form and expressed the wish that 'this my will and any codicil I may make shall be construed and operate as far as the case admits according to the law of England'. He devised and bequeathed the residue of his estate to trustees on trust for sale to be held as if the moneys and investments representing the same were capital moneys arising from his 'settled estates'. His 'settled estates' consisted of English property which he devised to the use of his wife for life with remainder to the use of his eldest son for life with remainder to the use of the sons of his eldest son successively in tail male with remainders over. The testator died in 1908, domiciled in England. His wife died in 1930. The eldest son died in 1954. The testator's residuary estate included land situated in the Union of South Africa, which property the trustees, in exercise of a power to postpone sale contained in the will, had retained.

The question before Upjohn J. was as to whether the land in South Africa was, by virtue of section 28 (2) of the Finance Act, 1949, excluded for estate duty purposes from the property passing on the death of the testator's son. The land was, by the law of South Africa, immovable property. The narrow question, therefore, was as to whether the 'proper law' was English or South African. The learned judge held it to be the former and that estate duty was accordingly payable.

Upjohn J. held that the question was one of testamentary succession: 'it seems to me to be perfectly clear that, in the case before me, the property passed on the death of his son, under or by reason of a disposition (the testator's will) and not by devolution. The question, therefore, which I have to determine is what is the proper law of the testator's will concerning the Steenbokspan farm?'<sup>5</sup> Various suggestions have been made as to the correct test for determining the proper law of a testamentary disposition. Upjohn J. took what must now be the accepted view that it is 'essentially a question of the intention of the testator to be ascertained upon the true construction of the disposition in the light of all the relevant surrounding circumstances'.<sup>6</sup> Applying this test to the case before him, he found the proper law to be English law.

<sup>1</sup> [1959] 2 W.L.R. 128, 137.

<sup>2</sup> Cheshire, *Private International Law*, 5th ed., p. 574.

<sup>3</sup> *Ibid.*, p. 554.

<sup>4</sup> [1959] 2 W.L.R. 427.

<sup>5</sup> *Ibid.* 427, 433.

<sup>6</sup> *Ibid.* 427, 435.

It was not even argued in *Philipson-Stow v. Inland Revenue Commissioners* that domicile should by itself be decisive. A dictum of Lord Greene M.R. in *Duke of Marlborough v. Attorney-General*<sup>1</sup> to this effect cannot be accepted as representing the law. However, there is authority for the existence of a rebuttable presumption in favour of the *lex domicilii*, and this is the view of both Cheshire and Dicey. The former states the function of the *lex domicilii* thus:

'A will of immovables must be construed according to the system of law intended by the testator. This is presumed to be the law of his domicile at the time when the will is made, but the presumption will be rebutted if evidence is adduced from the language of the will proving that he made his dispositions with reference to some other legal system.'<sup>2</sup>

Dicey's Exception 6 to Rule 85 runs as follows:

'A will of immovables is in general to be interpreted with reference to the law of the testator's domicile at the time when the will was made, but this presumption may be displaced by any facts, such as the use of technical terms, which indicate that the testator had in mind the law of the place where the immovables are situate or any other law.'<sup>3</sup>

The nature and effect of this presumption is not altogether clear. In the *Philipson-Stow* case, although the testator was domiciled in England, Upjohn J. does not appear to have placed much reliance upon any presumption in favour of the *lex domicilii* when coming to the conclusion that the proper law was English. It is, of course, true that reference to such a presumption was unnecessary in view of the learned judge's conclusion that 'looking at the will of the testator as a whole, it seems to me reasonably clear that he wanted English law to govern all the dispositions contained in his will'.<sup>4</sup> On the other hand, it may well be that the presumption in favour of the *lex domicilii* is no more than a presumption of fact rather than one of law, and, moreover, that in cases of immovables it is a weaker presumption of fact than it is in cases of movables.

It was argued for the plaintiffs in *Philipson-Stow v. Inland Revenue Commissioners* that the proper law governing the disposition of a foreign immovable must necessarily be the *lex situs*. It was conceded by the Crown that rights in relation to foreign immovables which are inconsistent with the local law cannot any more be created by will than they can in any other way. But Upjohn J. accepted the Crown's further submission that the settlor is not precluded from choosing the law of a country other than the *situs* to govern his disposition in relation to immovables so far as such dispositions are valid by the law of the *situs*. This is the principle stated by Dr. Cheshire and by Dicey. Dr. Cheshire writes: 'If, however, the interest that arises from such construction [i.e. according to the testator's intention] is not permitted or not recognised by the *lex situs* the latter law must prevail.'<sup>5</sup> Dicey's Comment on Rule 85, Exception 6, states that: 'In any case the will cannot be interpreted so as to involve any violation of the local law affecting the immovable'.<sup>6</sup> In the instant case the payment of English estate duty would not involve contravention of South African law. There will be, no doubt, some cases in which a rule based upon this reconciliation between the principle that the *lex situs* governs immovables and the principle that effect should be given to testamentary intentions will give rise to practical difficulties. But in principle it would seem to be correct. The *lex situs* rule is based upon considerations of necessity: the judicial and administrative agencies of the *situs* have control. But so long as nothing is done which involves violation of the law of *situs*, these considerations are satisfied, and the way is open to seeking to give effect to the intention of the testator.<sup>7</sup>

P. B. CARTER

<sup>1</sup> [1945] Ch. 78, 83.

<sup>2</sup> Cheshire, *Private International Law*, 5th ed., p. 576.

<sup>3</sup> Dicey's *Conflict of Laws*, 7th ed., p. 528.

<sup>4</sup> [1959] 2 W.L.R. 427, 436.

<sup>5</sup> Cheshire, *op. cit.*, p. 576.

<sup>6</sup> Dicey, *op. cit.*, p. 529.

<sup>7</sup> The Court of Appeal has by a majority affirmed the decision of Upjohn J., [1960] 2 W.L.R. 32.



## REVIEWS OF BOOKS

*Le Droit international nouveau dans ses rapports avec la vie actuelle des peuples.*  
By ALEJANDRO ALVAREZ. Paris: Editions Pedone. 1959. 636 pp. £3. 10s.

It is scarcely an exaggeration to say that the many individual and dissenting opinions delivered by Judge Alvarez, while he was a member of the International Court of Justice during the first nine years of the Court's existence, were not well received in the Anglo-American legal world. The reasons for this were twofold. First, it was felt that Judge Alvarez was using the Court too much as a platform from which to expound his own peculiar approach to international law instead of deciding cases on their merits. An example of this occurred in the *Fisheries* case<sup>1</sup> between the United Kingdom and Norway in which, in an opinion of nine pages, only one page was devoted to the case actually before the Court. Secondly, Judge Alvarez's approach to international law was considered to be altogether too revolutionary, scarcely reconcilable indeed with the sources of international law prescribed for the Court in article 38 (1) of its own Statute.

At the same time there was never any disposition, least of all in Anglo-American legal circles, to deny that Judge Alvarez was an outstanding member of the Court. The history of the Anglo-American legal system abounds with examples of the dissenters of today being regarded as the orthodox authorities of tomorrow, and there is no reason why some day an equivalent metamorphosis should not take place in the international legal system also. In fact, such a development may well be a hallmark of a mature legal system. Again, it was impossible, even for his most severe critics, ever to doubt Judge Alvarez's integrity and sincerity. His consistency and impartiality, as well as his devotion to the cause of international justice as he understood it, were no less manifest. In a powerful dissenting opinion, for instance, he sought to uphold the jurisdiction of the Court in the *Anglo-Iranian Oil Company* case,<sup>2</sup> whilst he would have simplified the controversial issues which arose in the case concerning *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*<sup>3</sup> by denying the right of States to make reservations to that convention at all. Moreover—and this has probably pleased Judge Alvarez most of all—there are signs of an increasing understanding of, and even sympathy for, some of the basic ideas which he has been trying to express during the course of an exceptionally long career.<sup>4</sup>

Possibly some of those who were most inclined to criticize Judge Alvarez for the views he propounded in his various individual and dissenting opinions did so because they were taken aback by the novelty of these views, and did not realize that he had been expressing such views, or something like them, for nearly fifty years. To Judge Alvarez a seat on the international bench no doubt presented itself as a signal opportunity to render more effective the work of a lifetime. While purists may object that membership of the Court should not be used for such purposes, it is only human to recognize that it often will be. In any case, it is probably better that the Court should be staffed with ardent, even if somewhat intemperate, advocates of the cause of international law than with political cynics indifferent to that cause.

This book—published when the author was already over ninety years old, and a

<sup>1</sup> *I.C.J. Reports*, 1951, p. 116.

<sup>2</sup> *Ibid.* 1952, pp. 93, 124.

<sup>3</sup> *Ibid.* 1951, pp. 15, 49.

<sup>4</sup> See, especially, Sir Gerald Fitzmaurice in this *Year Book*, 28 (1951), p. 14.

remarkable achievement on that score alone—may not unreasonably be regarded as the culmination of Judge Alvarez's remarkable career in international law. As long ago as 1910 he published *Le Droit international américain*, marking the special interest which he has always taken in the development of inter-American law. This law he has always conceived as being both compatible with general international law, and also especially appropriate to a community of nations which is more solidly knit than the world as a whole. In 1912 appeared *La Codification du droit international*, in which the author urged the necessity of keeping international law abreast of the times. In 1916 came the even more forward-looking work, *Le Droit international de l'avenir*, followed in 1928 by *La Reconstruction du droit international et sa codification en Amérique* and in 1932 by *La Déclaration des grands principes du droit international moderne*. The very titles of these publications, as well as of many others far too numerous to mention here, suggest a lifelong dissatisfaction with the existing state of international law and a constant effort to modernize it along new lines. It was surely then no surprise when, on his election as a member of the International Court of Justice, Judge Alvarez began to expound the general philosophy of the 'new international law'.

At some risk,<sup>1</sup> this review will now attempt to summarize the main principles of the new international law as put forward by its main exponent. It is essential to realize at the outset that the new international law is not a legal concept alone. This is illustrated by the fact that, in a book containing an introduction and three parts, only the third part is devoted to international law as such.

The first part of the work is devoted to an introductory study of what the author considers to be the most important problems of the day. These problems are, in the first place, the cold war; and, in the second place, what he describes as 'the crisis of classical international law'. This crisis, which in the author's opinion necessitates the replacement of classical law by the new international law, is further elaborated in the third part.

The second part is much more substantial and is entitled 'La connaissance de la vie des peuples'. It is divided into three sections, each of which is concerned with a new science which, according to Judge Alvarez, it is necessary to create. These sciences are respectively—it is better to give their names in the original French—'la science de l'évolution de la vie des peuples', 'la science de la psychologies des peuples' and 'la science de la rénovation des bases de la vie sociale'. Judge Alvarez professes to find difficult the works of Anglo-Saxon writers, such as McDougal and Stone, who have introduced sociological concepts into international law. Anglo-Saxon readers in their turn are likely to be somewhat puzzled by these extremely general notions expressed by Judge Alvarez and to wonder why it is that what the learned judge has in mind cannot equally well be attained through such existing sciences as history, sociology, psychology, political science and international relations. However, it is more important to dwell on Judge Alvarez's aims than the means through which he would pursue them, and there can be no objection to his desire that international lawyers should possess a more complete understanding of the social background of their system as well as mere juridical technique.

The following are some of the distinguishing features of the important second part. First, there is a tendency to think historically in terms of distinct epochs rather than of a steady development, and it seems that the failure of most historians to proceed along these lines is the chief complaint which Judge Alvarez has against their science. For him

<sup>1</sup> Judge Alvarez considers that his ideas have not been correctly interpreted by Professor William Samore in his article entitled 'The New International Law of Alejandro Alvarez', in *American Journal of International Law*, 52 (1958), p. 41.

all turns on the fact that within the last two centuries there have been three great social cataclysms, those of 1789, 1914 and 1939; and, since law is a consequence of social facts, each of these cataclysms is regarded as having had a decisive effect upon the international law of the period. Secondly, there is a tendency to make comparisons between the different experiences of Europe and America, both during and after these cataclysms. There is much in these comparisons that is valuable and interesting, although some Europeans may find rather irritating the constant assumption that things are better done in America. A sentence such as '*la pratique de l'arbitrage est une pratique avant tout américaine qui s'est ensuite répandue dans l'Ancien Monde*' (p. 99) may not find general acceptance. There also seems to be a tendency to exaggerate inter-American solidarity. For instance, Judge Alvarez claims (at p. 146) that, in the matter of the continental shelf, the United States set the pace and were followed by other American countries, whereas the truth is that the practice of some Latin American countries departed so much from that of the United States that the latter had to protest. Another claim which will not find general acceptance is that which would make certain inter-American rules binding on countries from other regions without their consent (p. 149). Preoccupation with inter-American solidarity naturally inclines Judge Alvarez to a regional approach to international law. But in developing this approach—he seems to regard the idea of a world State as a social absurdity—he is naturally at his best when discussing the problems of those parts of the world with which he is most familiar, namely, Latin America and continental Europe. His rather superficial comments on Soviet affairs may be excused, as may the fact that the British Commonwealth remains for him an enigma. But it is disappointing to find the apostle of the 'new international law' devoting comparatively little attention to the problems of the nascent nations of Asia and Africa.

A third, and not unwelcome, feature of the second part is the emphasis placed upon psychological considerations, although here again Judge Alvarez chides the professionals for concentrating on the psychology of the subconscious lives of individuals rather than on the collective psychology of social groups. Because of the psychological factor, Judge Alvarez says it is absurd for jurists to give, as the three indispensable conditions for the existence of a State, a territory, a population and a government without also mentioning '*le sentiment national*' (p. 178). The same approach naturally leads the author to reject the constitutive theory of recognition. '*Les Etats nouveaux*', he says (p. 186), '*n'ont pas à demander leur reconnaissance; il suffit qu'ils se présentent en Etats constitués et agissent comme tels. . .*' An even more important reason why it is necessary to understand the psychological factor in international relations is that the ultimate source of international law is '*la conscience juridique des peuples*', which is not at all the same thing as 'the general principles of law recognized by civilized nations' of article 38 (1) (c) of the Statute of the International Court of Justice. Without the aid of any positive enactment, a mere change in this 'juridical conscience'—itself a natural result of one of the social cataclysms—is sufficient to effect a change in international law, as, for instance, recently with the condemnation of war and genocide as international crimes. While the 'juridical conscience' may express itself through formal treaties, it may also do so through resolutions of the General Assembly and decisions of the International Court of Justice. Consequently Judge Alvarez would give to such resolutions and decisions a far more general legal effect than would most authorities. In fact, one of the consequences of this psychological approach to world problems is to blur the distinctions often drawn between international law and international morality, and again between political disputes and legal disputes.

The third part consists of an exposition of the principles of the 'new international



law'. The starting-point of the doctrine is that the 'new international law' corresponds to a new social régime, that of interdependence, which has succeeded to a previous régime, that of individualism and independence. The 'new international law' is not *lex ferenda*; it already exists. Its existence does not depend on recognition in State practice but on the mere social fact that some of the principles of classical international law are obsolete and need to be replaced. We are in a transitional period, with some matters still regulated by classical international law and some by 'new international law'. The latter is described by Judge Alvarez as being 'dynamic', and it would seem that it must always be so, because, if past experience is any guide to the future, it is unlikely that there ever will be a time when social conditions are so static as to be capable of regulation entirely by the principles of an 'old law'. It seems, however, that in our own case the transitional period is made more difficult than it need be by obscurantist jurists clinging to outworn concepts of classical international law.

It would go beyond the scope of this review to set forth all the principles of the 'new international law', which in any case are already well known to readers of the reports of the International Court of Justice. It will be sufficient to call attention to a few of the more striking points. Although the 'juridical conscience' of the peoples is the primary source of international law, customs and conventions are still regarded as sources. In general, conventions bind only their signatories, but in the case of certain treaties a majority of States, especially if it includes most of the great Powers, can bind a dissenting minority. This arises simply from the fact that 'les Etats constituent une société' (p. 431). Certain rules of law are generated spontaneously simply because of 'les exigences de la vie contemporaine'. Such a rule is that of free transit through the Suez Canal (p. 432). Other principles of the 'new international law' are the right of under-developed countries to assistance from the United Nations and the right of all States to access to raw materials (p. 485). Continents are regarded as subjects of international law (p. 492). Ratification of treaties no longer plays the important role that it did in the past, since a signatory State may become bound by a treaty which it has failed to ratify—and in certain circumstances, as we have seen, even a non-signatory State may become bound. In fact, Judge Alvarez would like to introduce a system whereby all treaties come into force a year after signature, whether ratified or not. But if he would make it easier to enter into treaties, he would also by a generous interpretation of the *rebus sic stantibus* principle make it easier to resile from them (p. 496). Through the aid of methods of interpretation old treaties should be kept up to date, and one should always look to the spirit of the treaty rather than to the letter of the text. In particular, preparatory work should usually be ignored, and treaties establishing international organizations should be regarded as having lives of their own, independent of the original words (p. 498). Bodies charged with the task of codification, such as the International Law Commission, should not go into excessive detail but should content themselves with laying down general principles that are capable of development on a regional basis (pp. 517–20).

There is a great value for the 'classical international lawyer' in reading these ideas of Judge Alvarez, much though he may disagree with them. The necessity of justifying the present rules, however difficult this may sometimes be, is stimulating. To the charge that he is an iconoclast Judge Alvarez would respond by arguing that it is he who is the true friend, even saviour, of international law by reminding jurists that the law must be kept in close contact with underlying social realities. Because it has not yet found a satisfactory way of doing this, at any rate by peaceful means, international law has remained a somewhat ineffective system. Judge Alvarez argues that, because of the obsolescence of the law, there is an increasing tendency to resort to political rather than judicial agencies for the settlement of disputes. He would reverse this trend by making

the law itself more political. There is no easy way of combining the certainty and the objective character of the law with the suppleness and subjectivity that always go with political solutions. By virtue of his own iron rules of social behaviour Judge Alvarez's 'new international law' will itself become outmoded in the course of time. But while it lasts—and it will probably always be with us in one form or another—the dialogue between the supporters of existing institutions and those who would reform them drastically must be regarded as no less healthy and stimulating in law than it is in art. To those who have contributed a great deal to the discussion, as has Judge Alvarez, the thanks of all international lawyers are due, whatever their private persuasions.

D. H. N. JOHNSON

*Academie de Droit International de la Haye: Recueil des Cours, 1957.* Volumes 91 and 92. The Hague, 1958. 730 pp. and 886 pp.

The lectures given each summer at The Hague, here collected in two volumes each of over 700 pages, provide both a restatement of general principles and reflect also the current preoccupations of international lawyers. They serve therefore as an annual reassessment of the changing function of law in the international community. This may especially be said of Dr. Landheer's lectures on 'Current Sociological Theories and International Law', with which Volume 91 begins. His theme in brief is that international law may be guilty of a 'time or cultural lag', in that having been formulated in the high noon of the national state system it has failed as yet to provide fresh machinery for a world divided effectively into regional and global blocks. 'The question, however, is that international law developed as a system to maintain working relationships between states of comparable power while at present the same set of rules is still applied while the structure of international society has undergone a complete change' (p. 35). The matter may be illustrated by the contrast between the aims of the European Economic Community, which are frankly ideological, and the relations between the component parts of the Community, which are still very much confined within the old methods and levels of communication. Dr. Landheer thus provides the philosophic background for Dr. Robertson's lectures on 'Legal Problems of European Integration'. Dealing in turn with the executive, judicial and parliamentary organs which have been set up in Europe, Dr. Robertson notes the formative influence above all of the European Coal and Steel Community—on his finding the only truly 'supra-national' organization—and in particular the part which its Assembly played at a critical time in bringing about the present European Economic Community. In considering suggestions for the rationalization of the European organizations he points out that this may be less advantageous than it at first appears: although there is an evident danger from the dispersal of force and energy, the present piecemeal system does in fact provide the greatest degree of co-operation which is now possible and the advantages deriving from overlapping membership are not therefore to be ignored.

M. Charlier's lectures on 'Legal Questions raised by the Development of Atomic Physics' deal with what he comes near to suggesting either is, or should be, the first truly *res communis*. Atomic power, whether for peace or war, has shattered the national framework of all except the greatest of great powers, whilst no vested private rights have yet arisen to hinder future 'internationalization'. The international organizations which have been established in this sphere are not organizations in the usual sense of intergovernmental machinery alone. These organizations, in particular Euratom, have considerable powers of initiative and control, as active enterprises in their own right.

In addition to dealing with the novel questions of possible responsibility attaching to the supervision of atomic energy establishments, the creation of patent rights and the disposal of atomic waste, to name only some of the unchartered problems discussed, M. Charlier also examines the question of disarmament and points out that in the case of Germany and the Western European Union a pilot control scheme is already in operation.

The provision of harmonious national laws, a problem which is likely to become increasingly important under the Treaty of Rome, is the subject of the lectures by M. Matteucci, Secretary-General of the Institute for the Unification of Private Law ('Introduction to the Systematic Study of Uniform Laws'). Historically the movement to provide such laws has followed functional changes—international transport has been a successful sphere and under the active prodding of the Economic Commission for Europe commercial law is beginning to follow suit. The results of a survey conducted by the Institute suggest that wide national divergencies of interpretation, after uniform laws have been introduced, are not greatly to be feared.

With Professor Dillard's lectures on 'Some Aspects of Law and Diplomacy' we return to a more general theme. In the past he suggests that law has been over identified with the settlement of disputes and regarded as antithetical to diplomacy. In fact law, like diplomacy, is concerned with the provision of ordered relations among states and can alone provide a permanent footing for diplomacy. This leads him to consider, on an analogy with internal solutions found in federal states, possible machinery for solving such problems as the Indus rivers dispute and also the question of recognition and U.N. representation. If the latter were a matter more completely determined by law then political problems arising between nations could be more easily regulated within a stable framework.

The two final lectures in Volume 91, by M. Salvioli on 'Problems on Procedure in International Case Law' and M. Mosler on 'The Application of International Law by Municipal Courts', deal with more strictly legal matters. M. Salvioli ranges over procedural problems which have largely arisen out of preliminary objections to jurisdiction, such as the *circulus inextricabilis*, only finally to be resolved by the principles of effectiveness and good faith, of 'competence to determine competence', the founding of a dispute upon treaty provisions and the possible impleading of third party states. M. Mosler provides an informative and up-to-date survey of the comparative practice of national courts when dealing with issues of international law, particularly under treaties where conflicts with constitutional law are most likely to arise.

Sir Gerald Fitzmaurice, who delivers the opening lectures of Volume 92, devoted to 'The General Principles of International Law', seeks to demonstrate the predominance of the rule of law in international relations. He divides his subject into four themes touching respectively the automatic application, supremacy, unity and universality of international law. The necessary compression when dealing with matters of State practice lends this an unduly abstract air, but his lectures are at all times extremely lucid and his statement of theoretical issues, of the monist *v.* dualist controversy in particular, is as clear within as short a compass as is to be met with anywhere. Amongst the interesting points which Sir Gerald raises are the differences in relation to neutrality between totalitarian and other states and also the importance of individual choice, as well as of international recognition, of grants of nationality.

'The Development and Functions of Multilateral Treaties', by Professor Lachs of Warsaw, presents a scholarly account of the history of such treaties, from their origin in multipartite peace settlements up to the modern informal exchange of notes. Dealing with reservations, which have their origin, he notes, in the resort to majority decisions



and their continued rationale in the need for co-existence, he asserts the right of every State to make such reservations as it pleases which do not infringe either the general principles of international law, or the essential objects of the treaty.

Professor S. Bastid, the distinguished President of the U.N. Administrative Tribunal, presents an authoritative review of the case law of international administrative tribunals. This covers not only details of such matters as succession *mortis causa*, evidence and procedure, where a simple reference to 'the general principles of law' is unlikely to produce a satisfactory answer, but also an examination of the extent to which, even within the restricted field of organization-employee relations, matters have arisen of *droit administratif* proper, and the strict limits of the present control over executive decisions. This is altogether a most masterly exposition.

The two concluding lectures deal with armed conflict. M. Marin in 'The Evolution and Present Status of the Laws of War' provides a brief survey of the history of the subject, but little evaluation, if at all, of the various conventions and resolutions he enumerates. Dr. Zourek in 'The Definition of Aggression and International Law' traces the history of the attempts which have been made since the end of the First World War to place aggression within a suitable definition and in particular the efforts of one U.N. organ after another to deal with the problem. In the second half of his lectures, which are devoted to the theoretical questions raised, Dr. Zourek seeks to expand and defend the inclusive type of definition which the Soviet Union has advocated.

These two volumes well maintain the standard of earlier years and a special word of congratulation may be extended to the Curators of the Academy for the increasing number of countries whose nationals have contributed this year. The criticism which has been made in a previous review in this *Year Book* of the printing of the English text must, however, regretfully be repeated.

M. J. L. HARDY

*Grotius Society Transactions for the Year 1957*. London: The Grotius Society. 1959. xxix + 172 pp. Price to non-members 35s.

The *Transactions of the Grotius Society* for the year 1957 contain eight papers, seven of which are devoted to aspects of public international law and the eighth to a problem of conflict of laws. The names of the contributors are in themselves a guarantee of the quality of their papers and the briefest account of some of them may perhaps therefore be forgiven, particularly as the topics dealt with are, as usual, diverse. The first two papers do, however, deal with aspects of the same problem, that of the protection of the foreign investor, a problem which is also considered by Dr. Bowett as part of his paper, and as they are in a sense complementary a rather fuller account of them is given.

Professor Wortley's paper on 'The Mexican Oil Dispute, 1938-1946' deals with a particular case of expropriation. Mr. Brandon's paper 'Legal Deterrents and Incentives to Private Foreign Investment' is, on the other hand, a general study of some factors involved in the investment of capital in foreign countries, and it is interesting to compare his conclusions with the particular case-history given by Professor Wortley, especially as it is, as Professor Wortley says, something of a typical case-history on the modern 'indirect' technique employed to effect an expropriation. Professor Wortley gives a well-documented account of the matters leading up to the expropriation by the Mexican Government of oil properties belonging to companies in which, although the

companies themselves were Mexican, British shareholders had predominating interests. He then deals with the diplomatic action which followed the decree of expropriation of 1938, lucidly analysing the legal contentions put forward, and concludes by calling attention to certain lessons which can be learned from the dispute and its eventual settlement. Perhaps the most interesting of these is his view that it is better in such cases to proceed not upon the footing of a 'delictual' claim of 'denial of justice', which is bound to irritate the expropriating State, but rather upon the 'proprietary' basis of claiming restitution of the property seized or, alternatively, adequate compensation for it. In other words, to claim in detinue rather than trespass. Another lesson is the need for effective arbitration and valuation arrangements, difficult though it may be to agree on what system of law is to rule in such arbitration. Professor Wortley here adopts the suggestion that 'the general principles of law recognised by civilised nations' may be a useful basis on which arbitrators may adjudicate. He also stresses the unsatisfactory nature of local standards of valuation, which may fail to give investors the objective determination of their rights which they are entitled to expect.

Mr. Brandon's paper discusses problems raised by investment abroad. If, he says, States wish to attract foreign private capital they must create a 'favourable investment climate'. He examines the ways in which States may deter foreigners from investing their capital, principally by exposing them to the risk of direct or indirect confiscation of all or some of their property. After discussing the rules of international law governing expropriation and confiscation (against which one may usefully set Professor Wortley's account of the particular case) he turns to an examination of other kinds of deterrent which have been employed. As he says, the avoidance and removal of deterrents will be more effective in attracting investments than will be the creation of positive incentives. However, he shortly discusses incentives, first by the 'capital-exporting' States, such as the U.S. practice of affording governmental guarantees against non-business risks to investors abroad, the granting of exemptions from taxation, &c. He then goes on to mention various incentives offered by the 'importing' States. But, as he concludes, the existence in such states of investment laws is not in itself decisive, for practice may differ from legal principle. What is needed to attract foreign capital is rather an atmosphere of mutual confidence, co-operation and good faith, which may exist even without paper guarantees.

Dr. Bowett, on 'The Use of Force in the Protection of Nationals' discusses, as part of his thesis, whether force may lawfully be used in the protection of property abroad. He holds the view that the right of protection by force of nationals abroad is permissible even after the Charter, and holds that it includes the protection of property by force, though only in cases where the interests of the State or its nationals are essential in the sense that their destruction would involve an immediate and serious injury. Thus, the 'normal' act of expropriation would not justify the use of armed force. Dr. Bowett, of course, differs, in many of his views on the permissibility of the use of force, from writers of great authority but he presents his case clearly, recognizes the objections and is careful to stress that any action of this sort must be regarded as subject to control. He ends by regretting the absence of a judicial body vested with compulsory jurisdiction over the question of the legality of self-defence.

Of the other papers, Mr. Johnson's 'Piracy in Modern International Law' is mainly devoted to a learned discussion of whether piracy *jure gentium* must be committed on the high seas, and for private ends. Mr. Unger's principal aim is to demonstrate that the operation of the rules of conflict of laws is *not* conferred to situations which contain a foreign element. Dr. Micklem, on 'The Philosophical Tradition in International Law', could not be read without gain. Dr. Simmonds, on 'Some English Precursors of Hugo

Grotius', writes of the work of English writers on the laws of the sea and of war and may well stimulate the revival of interest in the history and historiography of international law which is, as he says, overdue. Lastly, Dr. O'Connell, in 'Some Problems of the Interaction of International Law and Constitutional Law in Federal States', discusses problems of a sort which the English lawyer rarely meets but which are obviously of great interest and of both academic and practical importance. It is not only lawyers who will find this paper of value.

A. ROGERSON

*Die Pflicht des Staates zur Gewährung diplomatischen Schutzes.* By KARL DOEHRING. Carl Heymanns Verlag KG, Köln-Berlin. 1959. viii + 127 pp.

This study of State responsibility for the granting of diplomatic protection to its nationals in other countries is published by the Max-Planck-Institut as the latest in its distinguished series of monographs entitled 'Beiträge zum ausländischen öffentlichen Recht und Völkerrecht'. It is a comparative study, for the municipal law of the U.S.A., Great Britain, Switzerland and France (pp. 47-89) is examined by the author in addition to that of the German Federal Republic (pp. 89-127) and the earlier German constitutions (pp. 25-47). Only a short section of the book is devoted to an investigation of principles of international law and the thesis which emerges from these pages (pp. 9-25) makes it apparent that the author's main interest, and the centre of his inquiry, lies in the field of State responsibility and rights in regard to diplomatic protection under municipal law. His view, and it is a widely accepted one, is that although the right of protection over citizens abroad is held by every sovereign State according to customary international law, there is no duty to exercise this protection and therefore no corresponding right of a citizen to demand such protection from his home state. Unfortunately, the author is content with the establishment of this thesis and is not prepared to examine in detail any of the controversial issues in international law which spring from the 'sovereign right of protection', e.g. the minimum standard of 'international law', 'functional protection', the 'national character' of claims, or retortion and reprisals; even the tests concerning the recognition of the right of diplomatic protection evolved by the International Court in the *Nottebohm (Second Phase)* case (1955) have to be relegated to a footnote.

However, once the reader accepts that the author is not primarily interested in the international aspects of diplomatic protection, the value of the work as a short comparative survey of a number of differing national solutions to some of the problems raised by questions of allegiance, protection and State policy is soon apparent. The text is lucid, the whole work is very clearly set out, and the author makes effective use of his comparative materials in the limited space at his disposal. The outline of British and French law is especially good (particular mention may be made of his discussion of the *Joyce* case, pp. 57 et seq.) although the treatment of such complicated doctrines as 'act of state', 'acte de gouvernement' or 'acte diplomatique' in such a compressed form is inevitably somewhat unsatisfactory. Nevertheless, this comparative survey admirably fulfils its purpose of underlining the conclusions which are drawn from the comprehensive and well-documented study of German law. This is the most valuable section of the book; both written and unwritten law is explained with due regard to the historical development of the various constitutions. Certain doctrines (e.g. 'justizfreier Hoheitsakt', 'the conscientious exercise of authority' by the executive in deciding upon a grant of protection, State responsibility for the compensation of nationals injured by an



'improper refusal' to grant protection) will be of considerable interest to readers in this country, as will the nature of judicial control over individual claims and over governmental negligence. The author's general conclusion, on the evidence of the law at present, is that, whilst the German Government, when it decides to grant protection to its nationals abroad, is obliged to follow certain objective municipal rules (and especially the rule that the decision must be arrived at in a responsible manner and after a careful and conscientious examination of all the circumstances), no national has a subjective right to claim such help in any particular case. Furthermore, even the State's general right of protection should not be exercised except in the interests of the community as a whole; the discretion of the government, save for its duty of care and conscience, is absolute since there is no international standard by which the actions of foreign States can be measured when an act of injustice or discrimination is complained of. The author's argument that subjective rights of protection cannot exist in conflict with positive law could be supported by examples from each of the municipal systems he examines. But it could usefully have been accompanied by some discussion of the standards of State responsibility which are gradually being established as fundamental rules of international law.

Doehring's 'Diplomatischer Schutz' will be welcomed as a scholarly and balanced survey of a most complex subject. Its usefulness could, however, have been greatly enhanced by a larger number of cross-references (especially in the section devoted to 'Rechtsvergleichung') and by the presence of a table of cases and a bibliography; these are surprising deficiencies and the more noticeable because of the careful and thoughtful use, throughout the book, of a wide and representative range of authorities.

K. R. SIMMONDS

*Les réserves dans les traités internationaux.* By KAYE HOLLOWAY, Docteur en Droit. Paris: Pichon & Durand-Auzias. 1958. 369 pp. 3,800 frs.

*Les Réserves dans les Traités internationaux.* By DIETRICH KAPPELER. Bale: Verlag für Recht und Gesellschaft. 1958. 101 pp. 15 Swiss francs.

It is always interesting to have the opportunity of reading together and comparing two new works on the same topic, particularly when that topic is as controversial as that of Reservations to multilateral treaties, where scholarly academic studies are much needed. These works deserve a fuller appreciation than it is possible to give in a single review, particularly as they differ quite considerably both in scope and in method of approach. Thus, Mrs. Holloway's work is much longer and more detailed than that of Herr Kappeler. It is also written with a greater emphasis on the political aspects of the problem while Herr Kappeler's is more analytical and purely 'legal' in nature. Mrs. Holloway cites the practice of States and international organizations much more comprehensively than does Herr Kappeler and her discussions of the Debates and Resolution of the General Assembly, the Advisory Opinion of the I.C.J. and the Reports of the International Law Commission are exhaustive. Herr Kappeler might with advantage have referred to these a little more fully.

In a sense Mrs. Holloway's work does not bear the correct title, for it contains discussions of other aspects of the law of treaties than Reservations. One is glad to learn that the projected English edition of her work (which will, one hopes, also contain an index, the absence of which is an omission which is shared with Herr Kappeler's book, though both have useful bibliographies) is to have a title which will give a better picture of the book's wider range. Thus, the considerable first part of her

work is devoted to a study of recent changes in treaty-making technique, and in particular to the increased importance of signature and of the effect of constitutional limitations. It would be a pity if this were to be overlooked because the title did not lead one to expect its presence.

Mrs. Holloway's work deserves to be read in full, and justice cannot be done to her arguments by the following inevitably brief account. In the second part she turns to Reservations proper and in discussing the actual law gives first a concise account of the opinions of many jurists, turning then to an examination of the practice of States and international organizations. She finds in both a degree of unanimity rare in international law that the consent of all parties, including signatories, is necessary, in the absence of provision in the treaty or earlier agreement, before a Reservation can have effect. She accords little general importance to the Pan-American system.

In the third part Mrs. Holloway describes with clarity the recent controversy on Reservations with particular reference, of course, to the Genocide Convention and gives an account of the various proceedings before the General Assembly, the statements to and the controversial Advisory Opinion of the International Court of Justice, for which she finds no warrant in the previous law, and of the Reports of the International Law Commission. She emphasizes how political considerations have governed the attitudes taken up by States and freely and trenchantly criticizes certain of the views put forward, pointing out the dangers to international law inherent in them. The Advisory Opinion, adopted, in spite of the International Law Commission's Report, in the General Assembly's Resolution of 1952 is criticized on the grounds that it impliedly confers on States freedom to make Reservations and thereby emphasizes their absolute sovereignty. She ends this part by analysing recent practice and with a lucid summary of her views.

Mrs. Holloway devotes the fourth part of her book to a fuller critical examination of the problem of Reservations, beginning with the 1952 Resolution. This part also incorporates a discussion of the judgment of the International Court of Justice in the *Norwegian Loans* case, which was delivered after Mrs. Holloway had in fact completed her original study, and its effect on compulsory jurisdiction in particular and Reservations as a whole. This fourth part is perhaps the most important and interesting section of the book, and Mrs. Holloway discusses the problems with vigour and freedom. She emphasizes how the difficulties of the question of Reservations are only an aspect of the wider difficulties in the way of the development of international law in the present international society and discusses the effect of the Resolution and Advisory Opinion in this light.

The book, which makes a real contribution to the study of Reservations, ends with an earnest call for a better understanding among nations, without which there is little hope of progress.

Herr Kappeler's work, though shorter, is also of great value in the study of Reservations, and complements that of Mrs. Holloway. He begins by analysing the present law and devoting chapters to the nature, proffering, acception, effect and withdrawal of Reservations. This is a careful and detailed analysis of theory and practice but the text is in the reviewer's opinion perhaps a little *too* concise, for although the author gives copious footnotes it would be more convenient to the reader to have more of the substance of his references incorporated into his argument. Nevertheless, he writes with clarity and accuracy and his account of the different theories of the acceptance of reservations, though brief, is excellent.

The second part is devoted to a discussion of the juridical nature of Reservations.

Herr Kappeler examines the main theories, viz., that a Reservation is a term of the contract and that it is a unilateral act, and having searchingly considered the consequences and difficulties of each is forced to the conclusion that neither gives an adequate theoretical basis and that any such basis must be found elsewhere. For this reason the author, in the third part of his work, turns to an examination of the recent evolution of international law in so far as it concerns Reservations in an effort to find therein a solution of the problems they pose. Stating that international law is in a period of transition between the old disintegrating classical law and a new but yet uncertain body of law he urges the necessity and indeed inevitability of *une solution de pis-aller* if present difficulties are to be regulated. Reservations are at the present day inevitable, but must not lead to greater abuses than they cure. Herr Kappeler lists the advantages of the insertion of a clause regulating Reservations in every treaty but rightly feels that this solution is not a substitute for a general rule on the point. Seeking for a solution he examines the theories mentioned in his first part and, in spite of its faults, advocates the principle of unanimous consent as being the best, though not an ideal answer. His view is in fact largely that of the *Harvard Research*. But he emphasizes the temporary nature of this answer and looks forward to a better one, though what this may be will depend on which path international law happens to follow in the future, and this is still unknown. As Herr Kappeler says, much has yet to be said on the question of reservations. One hopes that it is as well said as it is in these two books.

A. ROGERSON

*The Common Law of Mankind.* By C. WILFRED JENKS. London: Stevens & Sons Ltd. 1958. xxvi+456 pp. £3. 3s.

Dr. Jenks has for so many years been a prolific author of legal contributions that, to use his own words (p. 120), 'the leisure-hour speculations of a harassed international civil servant' have become a familiar source of enlightenment and stimulation for international lawyers all over the world. His interests are wide, his presentation is clear and persuasive, his judgment enthusiastic yet sound and detached, his approach original and always progressive. Indeed, he has 'that breadth of outlook and boldness in approach' which in his view 'are essential to the progress of contemporary international law in the present critical position of world affairs' (p. xii). His many admirers will be pleased that eight of his essays, written since 1951, have now, in substantially unchanged form, been republished in this book which, in addition, includes two novelties. The first of these new papers is an article on 'Atoms for Peace in International Law' (pp. 300-65), in the course of which Dr. Jenks reviews the problems of international organization and legislation as well as customary law created by the great technical revolution of our time. The second is much more important and also much more general in character. It is devoted to 'The Universality of International Law' (pp. 62-172) and must be regarded as the centrepiece of a work which, as its title indicates, presents the ambitious thesis 'that contemporary international law . . . must be regarded as the common law of mankind in an early stage of its development' (p. xi). This thesis may be correct, but whether Dr. Jenks has proved the correctness of the particular connotation he attributes to it is perhaps not entirely free from doubt.

The learned author starts from the fact that 'from a formal standpoint we have attained a universal legal order' (p. 79), and proceeds to ask how it is possible to fuse these formal elements 'into a body of law which expresses and protects the common interests of a universal community' (p. 80), or, as he puts it elsewhere (p. 87), into 'a



legal system with sufficiently deep and broad foundations to command the allegiance of a world community with a fundamentally changed composition and distribution of influence'. One of the most significant subjects to which this discussion leads is indicated by Dr. Jenks's question (pp. 91 and 106): 'How far can we successfully invoke general principles of law recognized by civilized nations in a world in which the civil and common law must share their former supremacy with Islamic law, Hindu law, Chinese law and Soviet law?' Dr. Jenks believes 'that we can' (p. 106), because there exists 'an area within which the most varied legal systems recognize certain common principles and have to a substantial extent mutually influenced one another's growth' (p. 109) or 'have been interacting upon each other in varying degrees since the dawn of history' (p. 113). There follows a lengthy investigation into nine specific topics to test the validity of the universal approach (pp. 120 et seq.). It involves many references to legal systems the knowledge of which is necessarily derived from secondary sources, and leads to the conclusion (p. 169) that 'we can no longer be content to assume that the law of the North Atlantic Community will be accepted without question by the world. We must learn to think instinctively in terms of a group of major legal systems including Latin American, Islamic, Hindu, Jewish, Chinese, Japanese, African and Soviet law'. There will, possibly, be a few students whose capacity for instinctive thinking will not be entirely sufficient for this purpose.

This is not the place to embark upon detailed criticism of Dr. Jenks's theory. It is unlikely to be readily accepted by anyone familiar with the problems of comparative law. Nor will it appeal to those who believe that it is not the lowest common denominator which necessarily determines the scope of general principles; that the law of the Afro-Asian block, while by no means irrelevant, is at present likely to indicate in many respects too low a denominator; that widely formulated maxims are not identical with those general principles which Article 38 envisages; that, in short, universality is incapable of achievement, nor required for the ascertainment of general principles. It must suffice to pay tribute to the far-sighted, though sometimes slightly exaggerated and diffuse, conception which Dr. Jenks develops with all his usual ardour.

Although the reviewer of a work of such high quality must be anxious to avoid the impression of carping criticism he may perhaps be allowed to register a mild protest against the way in which Dr. Jenks handles the principle of *international law*, according to which the sovereignty of a State is limited by the rule of law (pp. 123 et seq.). That principle, surely, is neither proved nor disproved by the development in *domestic legal theory* of the alleged maxim *rex legibus solutus est*—a development which, incidentally, cannot be fully assessed without a reference to Schulz, *English Historical Review*, 60 (1945), p. 136.

F. A. MANN

*European Institutions. Co-operation: Integration: Unification.* By A. H. ROBERTSON. London: Stevens & Sons Ltd. 1959. 19+372 pp. 45s.

Mr. A. H. Robertson, who is a member of the secretariat of the Council of Europe and well known for his writings on international institutions, has now produced an invaluable handbook which describes the entire range of European institutions from N.A.T.O., the Council of Europe and O.E.E.C., on the one hand, to the restricted groupings of Benelux and the Nordic Council on the other, together with a well-chosen appendix of documents and useful bibliographical notes. This work will prove invaluable to all students of the subject.

Although the author describes the work as 'an essay in that branch of international

law which is coming to be known as "the law of international institutions", the bulk of the book is descriptive rather than analytical, and Mr. Robertson is as much concerned to show the origins of the various institutions as to relate them to particular theories.

On the historical side, it is difficult to find fault with Mr. Robertson's presentation, though to describe the origins of the E.D.C. without reference to the American conviction of the necessity for some measure of German rearmament would seem difficult to defend. It may be also that Mr. Robertson's devotion to the cause of European integration tends to make him upon occasion over-emphasize the degree to which this has been achieved, as when he says that in the Consultative Assembly at Strasbourg 'the ties of party are stronger than those of nationality'. This should surely be qualified by a reminder that this is largely so only to the extent to which major elements of controversy between nations can be eliminated from the discussion.

On the analytical side, Mr. Robertson does not make too much of the distinction between intergovernmentalism and supranationalism. In particular, in describing characteristics of the O.E.E.C. he does not diminish the importance of the fact that it has upon a number of occasions taken 'decisions' which have 'imposed obligations on governments and, in some cases, set up new international machinery—things which, under the traditional methods of conducting international affairs, could only have been done by the conclusion of special agreements or conventions'.

Again, in considering the claims of the Coal and Steel Community to be a 'federal' authority, he calls attention to the fact that its powers do not include those of enforcement for which it must still depend upon the action of the separate States. Nevertheless, he is aware of the extent to which the Coal and Steel Community has been an innovator. For instance, there is the fact that the Treaty has 'quite rightly recognised the right of individuals—or at least of individual enterprises—to bring their cases direct before the Court, thus departing from the classic doctrine of international law that access to international tribunals is only open to States'. This is one of the respects in which he believes that 'the law of European institutions is developing beyond the traditional concepts of international law'.

Although a national of a country which has held aloof from the moves towards integration of the 'Little Six', Mr. Robertson is enthusiastic for what they have done. He refers to the opening in March 1958 of the first session of the new European Parliamentary Assembly as another 'great moment in European history, in which events occur which could change the fate of the nations'. Thus when he comes to making suggestions for the necessary rationalization of European institutions—suggestions which he makes on his own responsibility, of course, and not on behalf of the Council of Europe—he suggests that the Europe of the Six and its institutions be left wholly outside on the grounds that they 'constitute a group which is *sui generis*' since they 'give expression to the will of the Six to engage in a process of integration, involving the transfer of certain sovereign powers, which will probably lead during the lifetime of persons now living to some form of federation'. He again excludes for different reasons the other smaller and more limited institutions.

What he suggests in a well-argued chapter is briefly this: first, the Council of Europe and O.E.E.C. should be merged as the former has frequently argued. This merger should not be confined to making the Consultative Assembly the assembly for O.E.E.C. but should also involve the creation of a single ministerial body which could through suitable rearrangements also take authority over such organizations as the European Conference of Ministers of Transport, the European Civil Aviation Conference, the Customs Co-operation Council and any others of this kind for which a need may still

be found. A single European Council of Ministers and a single Assembly for the larger Europe would, he believes, provide that focus of public attention which the present proliferation of institutions makes ineffective. Clearly, however, the vitality and utility of this would much depend upon the creation of a free-trade area, negotiations for which looked more promising at the time when Mr. Robertson was writing than they do now that the book has reached the readers' hands.

The other major proposal is the abolition of W.E.U. Its military functions could, Mr. Robertson cogently argues, be discharged by a restricted group within the N.A.T.O. framework. Its cultural and social activities tend to duplicate or overlap with those of the Council of Europe. The important element is the Assembly which has shown considerable vitality. This, Mr. Robertson believes, could continue to exist also within the N.A.T.O. framework and might by the gradual extension of its membership provide 'a nucleus which might develop in time into the parliamentary assembly of NATO'. Exactly how this would be related in the earlier stages to the N.A.T.O. Conference of Parliamentarians, which Mr. Robertson says has come to stay and is 'likely to increase its influence, and perhaps its power, in future years', is not made altogether clear.

MAX BELOFF

*Diritto Internazionale*, Vol. II: *Organizzazione Internazionale*, Sezione Prima: *Soggetti a Carattere Territoriale*. By ANGELO PIERO SERENI. Milan: Giuffrè. 1958. xi+535 pp. Lire 3,500.

Successive volumes of this extensive treatise are reaching or are about to reach the public at frequent intervals. In welcoming the first instalment it was pointed out (this *Year Book*, 33 (1957), p. 377) that it struck a happy balance between the positive and the doctrinal aspects of international law and that the author's approach to his subject as a part of international politics leads him to give particular attention to bilateral treaties and to international decisions and awards.

The same tendency appears in the second volume which is devoted to the subjects of international law. Apart from a short discussion of the concept of personality in international law, it covers States, their creation, changes and extinction, their organization and territory, the high seas, territorial and other waters, the air, nationality and diplomatic protection, aliens and immunities, domestic jurisdiction and insurgents.

The author remains a convinced and convincing dualist, and his firm theoretical grounding makes his handling of such well-known problems as the rights of individuals, human rights, minorities, fundamental rights of States and jurisdiction over pirates and war criminals fascinating without losing touch with reality, orthodox and yet wholly practical and up to date. It is natural in a work conceived on big lines, such as the present, that original and controversial views are interwoven with much well-known material. Here it is only possible to refer to a few questions, although the work is a rich mine. Formosa is at present a territory not subject to the sovereignty of any State. Recognition of States is constitutive, unilateral, determined by effectiveness, but not the result of a duty. Yet it is a legal act and not a political gesture. Recognition of governments is equally determined by effectiveness, but is a political act. Here lie the elements of an interesting legal construction which imposes a duty to recognize States and allows a discretion in recognizing a government, but the author does not develop his argument. He denies any difference between *de jure* and *de facto* recognition and rejects the existence of a principle of retroactivity, but he admits that, by pronouncing



upon alleged rights and claims, the recognizing State may have implied that the recognition operates from a previous date. It is to be regretted that this theme is not carried a stage further, for it would appear that the so-called retroactive effect of recognition is nothing more than a reflex effect in municipal law which arises upon the occasion of, but does not necessarily follow from, the act of recognition. It means that the regulations of a non-recognized authority can be presumed to have been the law of the country concerned from the moment where they were made and that what were tortious acts according to the law of the previous authority have become lawful acts according to the new law, which can be attributed henceforth to the newly recognized authority and may entail international responsibility. The discussion of State succession remains a little theoretical, but the author may be right in stating that this topic is covered more by bilateral than by general rules. Yet it may be going a little too far to state that the position of the successor State towards rights of aliens is governed exclusively by the principles applicable to the treatment of aliens in general, and not by any special rules arising from succession. The vexed question of concessions comes to mind immediately, and with it the difference between the recognition and application of foreign private as distinct from foreign public law. On the other hand, the courageous and decisive arguments against the existence of State servitudes, of proprietary rights in international law in general, and of localized debts will appeal to many, although localized debts might have been given a more detailed and perhaps a more favourable treatment. It may be doubted whether immunity from local jurisdiction is due to the representatives of non-recognized governments in the absolute form which the author advocates. Sometimes a difference of formulation obscures a fundamental agreement with current thought. Thus the denial that prescription as a mode of acquiring title has a place in international law is mitigated by the admission that undisturbed possession acquires permanency in virtue of the principle *quieta non movere*. Exception may be taken to the basic assumption, derived from Vattel, that, in relation to foreign States, the property of aliens is to be considered as the property of the State to which the alien belongs. Although this approach facilitates the explanation why the State can predicate claims of a proprietary nature on behalf of its nationals, it introduces an element of confusion, since the title to the property must be validly vested in the individual in virtue of some rule of municipal private law which is applicable according to some rules of the conflict of laws. The author's formulation invites the creation of a system of property rights vested in States on the basis of rules which have no foundation in any system of private law. The categorical assertion that States are free with effect *erga omnes* to deprive their subjects of their nationality, with the result that they are not bound to receive them back, is not convincing. On the other hand, the chapter on the meaning of domestic jurisdiction is most helpful, although it may be argued that originally this concept was meant to embrace situations where the State exercised its authority in relation to its own subjects within its own territory, with the result that no international claim, as distinct from an international remonstrance, inquiry, humanitarian intervention or the like could be put forward. The final chapter on insurgents suffers from compression inasmuch as the principles relating to new States arising from insurgency and those concerning insurgent governments tend to invade each other's preserve.

The controversial aspects which have been singled out for discussion illuminate the original character of the treatise, its broad sweep and its admirable documentation. Its use could be enhanced by a clearer indication of chapter and section headings and by the addition of an index. The completion of this vast enterprise by the publication of the promised volumes on international organizations, treaties and disputes will place a debt of gratitude upon the entire international legal community. K. LIPSTEIN

*Expropriation in Public International Law*. By B. A. WORTLEY. Cambridge: At the University Press. 1959. xviii+169 pp. 30s.

This scholarly and valuable work by the Professor of International Law and Jurisprudence in the University of Manchester is the sixth and latest volume in the Cambridge Studies in International and Comparative Law. Professor Wortley considers the present-day public international law aspects of confiscation, expropriation with or without compensation, and nationalization, and provides a systematic framework for the general problems in these fields which mainly concern those who advise persons, corporations or States that have suffered loss as a result of the actions of a foreign government. The principal object of the book is an attempt to reconcile the conflicts which may arise between the principles of municipal law and those of public international law as a result of an expropriation by the *lex situs* purporting to abolish or limit the claim to a 'thing' expropriated which, until the moment of expropriation, was generally recognized by the *lex situs* as belonging to a foreign State or to a foreigner represented by that State. The examples of this conflict in recent years have provided the author with plenty of material which he subjects to a more critical and instructive analysis than did either of his immediate predecessors in this field, Dr. Friedman (*Expropriation in International Law*, 1953) and Professor Foighel (*Nationalization*, 1957).

In the early pages of the book the author sits in the Jurisprudential half of his Chair and conducts a discussion of the concepts of ownership and property which may appear as an unpromising beginning to the practitioner who reads the book in the hope of getting a different kind of instruction. But this class of reader should not be deterred; he will not be disappointed if he reads on. The remainder of the book, for the most part, keeps in view the practical problems, contains much useful guidance throughout (including help on procedural questions), and offers a number of new and interesting ideas.

The book considers expropriation with adequate compensation paid before or after taking (Ch. II) and discusses the duty to make adequate compensation (Ch. VII), but it does not answer adequately the question, surely one of the 'most urgent present-day aspects' with which the author sets out to deal, whether such compensation must, under international law, be 'made in effectively realizable form' (see Article VI (4), Treaty of Friendship and Commerce between the United States of America and Nicaragua, 1956). It is no answer to say (p. 135) that compensation payable in non-transferable currency raises the question whether or not that compensation is 'the nearest thing to that specific restitution which may be physically or politically impossible'. That is to restate the original issue of adequacy. Is the answer that the principle of equality of treatment (pp. 120 et seq.) also requires that the expropriated foreigner has no claim to stand in an exceptional position in the matter of transferability as compared with the national (see Friedman, *op. cit.*, p. 219), irrespective of whether the currency is 'capable of being reinvested in the debtor country' (Wortley, p. 135; Foighel, *op. cit.*, p. 124)? If the property had been sold by the foreign owner under a transaction privately concluded under the *lex situs*, the proceeds of sale would have been subject to local exchange controls and to any laws relating to investment by foreigners. 'If a non-national buys property he may be deemed to know the local law . . .' (Wortley, p. 122).

Those who are concerned to see that international capital investment is given a certain degree of security under the rules of international law will wish that the author had dealt more fully with methods of protecting international private investment

against the more obvious political risks. The author's description under the restrictive sub-heading 'Modern Attempts to Protect Property by General Treaty' (pp. 148 et seq.) is the only section of the book which one can fairly describe as inadequate. The Swiss Government has submitted a draft of a possible Multilateral Convention to the O.E.E.C., and non-governmental bodies and groups—international, European, German, French, Brazilian and Anglo-Dutch—have recently made various contributions to the study of this problem. In the post-war years the United States of America has sought to deal with it by provisions in bilateral commercial treaties. It is an urgent problem on which Professor Wortley's views would have been welcome and no doubt instructive. The attitude of some countries to private investment from abroad partly accounts for the fact that, as Professor Wortley points out (p. 151), in place of the former investment by the private lender or entrepreneur, modern assistance to governments of under-developed countries tends to come increasingly through international agencies and schemes for assistance. The author could now add that one such scheme, the Colombo Plan—which he describes anachronistically as the British Commonwealth 'Colombo Plan' (donor countries include the United States of America and Japan)—provides assistance to the Republic of Indonesia whose recent nationalization of Dutch-owned enterprises (an example of expropriation not mentioned by Professor Wortley) has been condemned as contrary to the principles and rules of international law (see Lord McNair, Professor H. Rolin and Professor A. Verdross in *Nederlands Tijdschrift voor International Recht*, vol. vi (1959), pp. 217 et seq.).

Professor Wortley tells his readers that he hopes to produce a separate work dealing with the problems of private international law arising from expropriation in relation to the general principles of public international law discussed in the work under review (p. 151, note). This reviewer, with all deference to the eminent source of the advice which caused the author to abandon his first intention to include in this book a great deal about the conflict of laws (p. vii), expresses the hope that Professor Wortley will present the results of his further study of the private international law aspects by expansion of this book rather than in the form of a companion volume. It is artificial to separate the two aspects. If the rules of public international law are to be enforced, one way of doing this is through municipal courts when they apply the rules of private international law to questions of the passing of title to property which has been previously seized elsewhere in pursuance of a decree of nationalization. A work which deals with the legality of nationalization should not, and if it is considering also private international law it need not, ignore the practical importance of cases such as *Anglo-Iranian Oil Company v. Jaffrate and others* (1953), 1 W.L.R. 246; I.L. Rep. 316 (Supreme Court, Aden) and *Anglo-Iranian Oil Company v. Idemitsu Kosan Kabushiki Kaisha* (1953), I.L. Rep. 305 (High Court, Tokyo), which receive from this author only passing reference (p. 18) in an analytical study of the nature of expropriation. Professor Wortley's studies on private international law relating to expropriation (see *Recueil des Cours*, 94 (1958), pp. 91-257, 67 (1939) (i), pp. 345-425; *Grotius Society Transactions*, 33 (1948), p. 25) are well known to those who advise on the legal problems which arise from expropriation, and as those studies are of the same high quality as the work reviewed here, it must not be taken as a criticism of either if one expresses the hope that the author will fulfil soon the intention which he expresses at the end of the book of bringing up to date his studies on the conflict of laws aspects, and that he will re-publish them as part of an enlarged edition of the present volume.

M. E. BATHURST



*Comunicazioni e Studi*, Volume IX. Edited by R. AGO, M. GIULIANO, P. ZICCARDI, A. MIGLIAZZA and L. LUZZATI LENGHI. Milan: Giuffrè, 1958. 498 pp. Lire 3,500.

The ninth volume of this valuable annual publication follows its set pattern (see this *Year Book*, 34 (1958), p. 448; 33 (1957), p. 368, 32 (1955-6), p. 337, 31 (1954), p. 493, 29 (1952), p. 490). While the student of Italian legal thought and practice will appreciate most the exhaustive surveys of Italian literature and decisions bearing on public and private international law, the general reader will turn first to the specialized articles on topical and historical problems. Among these, the contribution by Dr. L. Kopelmanas on 'Recognition in International Law' is the most challenging. Taking as his text a recent book of Jean Charpentier, he expands the latter's conclusions so as to deny any useful legal functions to recognition. In the first place, the legislative, administrative and judicial acts of an effective authority have their effect even in the absence of recognition, and in virtue of the local rules of the conflict of laws they are applied, recognized or enforced as the law, governmental acts and decisions of the courts of the country where the non-recognized authority operates. The reviewer has expressed a similar view some ten years ago (*Transactions of the Grotius Society*, 35 (1950), pp. 157-88), but the following reservation is indicated. Where the claim is based on a tort committed abroad by a member of a non-recognized authority, which is subsequently recognized and adopts the act, the claim is lifted out of the sphere of private law into that of international law. Dr. Kopelmanas seems to deny this conclusion since he assumes that even non-recognized authorities, such as insurgents, are responsible in international law. In the second place, recognition has ceased to play a useful function in conferring a *locus standi in judicio* or immunity from jurisdiction, once *de facto* recognition took its place next to *de jure* recognition and was accorded legal effects. The remaining intra-national relations supply further examples to show that non-recognition is either an inconvenient barrier, which is overcome by legal fictions, such as those inserted in treaties with non-recognized Governments, or a convenient excuse which conceals the discriminatory exercise of discretion, such as the admission of aliens. This brilliant sketch invites the reader to test the author's thesis against the practice of States. Even if it is true in part only, it requires a further constructive effort, for it cannot be denied that, whether or not certain legal consequences follow from recognition, recognition is frequently denied and certain legal situations ensue. It may appear, upon consideration, that recognition or its refusal is a discretionary act provided by the law and that the so-called effects of non-recognition are nothing more than the legal concomitants of a certain type of reprisals, namely of non-recognition. F. Wolf examines the membership of the International Labour Office, with special regard to the questions whether a seceding State remains bound by the conventions which it has signed, and whether a successor State steps into the shoes of its predecessor. G. Badiali studies the diplomatic history which has led to the present rules on trusteeship agreements with reference to two questions. The first is whether in consequence of the Yalta Agreement trusteeship agreements must be considered in two stages, one of which constitutes the 'subsequent agreement' contemplated at Yalta, while the other determines the operative conditions. The answer is negative. The second concerns the meaning of the phrase 'States directly interested' employed in Article 79 of the Charter, and the author marshals weighty arguments to show that these words are intended to include those States which have a legal interest of some kind. T. Ballarino contributes a lucid and well-informed survey of modern German writings on general problems of

private international law. B. Conforti gives an account of the main features of the Geneva Conventions on the law of the High Seas. Finally, Ida Limentani Calabi offers some suggestions as to the types of arbitration used in ancient Greece. Nearly one-third of the volume is taken up by the surveys dealing respectively with the literature on public international law (F. Capotorti), with the Italian cases concerning this subject (L. Citarella) and with the practice of the International Court of Justice (F. Fabozzi) during 1956. The practice of the Italian courts in matters of private international law during the same period is studied by F. Bianchi, whose contribution is particularly attractive for its blending of facts and law.

The reviews of books and articles range over a wide field and include accounts of the articles on public and private international law published in the principal periodicals of the world.

K. LIPSTEIN

*The Exploitation and Conservation of the Resources of the Sea: A Study of Contemporary International Law.* By F. V. GARCIA AMADOR. Second Edition, Leyden: A. W. Sijthoff, 1959. 212 pp. £2. 6s. 16d.

This is the enlarged English edition of the author's book in Spanish published in 1956 under the title *La Utilización y Conservación de las Riquezas del Mar* which had been based on his lectures delivered earlier the same year at the Escuela de Funcionarios Internacionales in Madrid and the Institut Universitaire de Hautes Études Internationales in Geneva.

Dr. Garcia Amador, who took an active part in the work of the International Law Commission on the codification of the law of the sea and in the 1958 Geneva Conference, gives the reader the insight and the first-hand knowledge that can only be acquired through such close contact with the practical problems in the field.

The present volume is a study of a subject which is one of the most topical questions in contemporary international law. A new system has emerged as a result of the discovery of new techniques for exploring and exploiting the natural resources of the sea, thus necessitating a substantial revision of certain traditional concepts and principles of the international law of the sea. The author sets himself the task of examining this 'emerging new system at the present stage of its development, with due reference to the interdependence between the different maritime zones and to the technical, scientific and socio-economic aspects of the subject'. Accordingly, he sets out and analyses methodically the historical antecedents of the various new situations that have arisen and the solutions reached in this branch of the law. Throughout his work, he is guided by the conviction that 'the new law must recognize and safeguard, by just and effective rules, the legitimate interest of all in the rational utilization of the resources of the sea'.

In his Introduction the author first deals with the traditional principle of the freedom of the seas, then sketches the work done by the League of Nations, the Organization of American States and the United Nations and points to the problems that arise from the confrontation of the traditional views with the present-day economic and social needs. Part I starts with an historical sketch of the development of the régime of the high seas and the principle of the freedom of the seas. This is followed by a study of the territorial sea, the contiguous zone and the new 'specialized competences', i.e. the claims made by coastal States to exclusive and preferential fishing rights. Part II is exclusively devoted to the submarine areas and the right to use their resources, and Part III to the problems related to the conservation of the living resources of the sea. In his Conclusions, the

author deals with what he calls the 'new concept of the special interest of the coastal State'. The main development in this branch of international law, he contends, has been the fact that 'the existence has been admitted of a distinct category within the traditional concept of the "interested State", namely, that of coastal States with a "special interest" in maintaining the productivity of the living resources to be found beyond the bounds of their territorial seas' (p. 202). However, he believes that the recognition of an exclusive right of use would be justified only if interests are at stake which are judged superior to the general interest in the exploitation of these resources. He recognizes the existence of such superior interest when the resources in the zone adjacent to the territorial sea of a State are of vital importance to its economy or for the feeding of its population or because the yield is due to the efforts and sacrifices it has made to maintain it. But, even in these cases, the author does not concede an exclusive right so long as fishing by the nationals of the non-coastal States does not lead to a decline in the optimum sustained yield of the resources. He concludes his work with a discussion of the protection of the 'general interest' (i.e. the interest of the non-coastal States as distinct from the 'special interest' of the coastal State) and with constructive proposals as to the terms of reference and the criteria to be used by the forthcoming conference on the law of the sea for considering and settling the problems of the breadth of the territorial sea and the claims to 'exclusive' and 'preferential' fishing rights.

Dr. Garcia Amador is an ardent advocate for the necessity of considering the economic and social elements in the formulation of legal rules, in the establishment of the aims of conservation and in the resolving of the conflict between the various interests involved. The guiding principle throughout his book is the 'need to ensure adequate safeguards for the two great interests involved: the "general interest" in the optimum sustainable yield of the resources and the "special interest" of the coastal State in maintaining the productivity of those resources in waters near its territory' (pp. 147-8).

The size of the volume has necessitated a somewhat cursory survey of some of the important developments in this branch of the law, and insufficient space has been devoted to the work of the Geneva Conference on the Law of the Sea. The absence of an index is also to be regretted. However, these criticisms do not detract from the book as a valuable and a stimulating account of the present law in this field and its historical development.

S. TORIGUIAN

*La Prova nel Processo Internazionale.* By LUIGI FERRARI BRAVO. (Pubblicazioni della Facoltà Giuridica dell'Università di Napoli, Volume XXXI.) Naples: E. Jovene, 1958. 166 pp. Lire 1,200.

The law of evidence and procedure as applied by international tribunals has been, for a long time, the object of detailed studies by Italian scholars, who have drawn much inspiration from the highly developed Italian literature on the theory of procedure in Italian domestic law. The present volume is characterized by these features. Domestic rules and the theories to which they have given rise are tested in the international sphere; and if the material, drawn from the practice of international courts and tribunals, is used somewhat eclectically, and if the argument is mainly abstract and the conclusions are negative on the whole, the result is nevertheless positive in that it shows the flexible and pragmatic character of the international rules.

After a somewhat inconclusive discussion of the legal nature of international tri-



bunals, of their rules of procedure and of the compromis, the author turns to the object of proof. He examines briefly the restriction to facts pleaded by the parties and dismisses in passing the problem of presumptions. On the other hand, he devotes much attention to the question whether the court must confine itself to the law as pleaded by the parties, or whether the maxim *jura novit curia* holds good. His conclusion that the maxim does not apply, having regard in particular to the overwhelmingly customary character of international law, may not appear convincing, but in the absence of a comparison of the pleadings in international claims with the final awards and decisions, any criticism must also remain somewhat speculative. Yet some recent decisions, such as that in the *Nottebohm* case, point in the opposite direction. Nor is it possible to accept that certain instances where the parties have treated the award as void because the arbitrator exceeded his powers confirm the author's thesis. Finally, the wording of Article 38 of the Statute of the Court seems to contradict it, and the circumstance that the parties refer to the law in their pleadings only serves to circumscribe or to oppose the claim in relation to the facts which are alleged. But even if international courts were bound to pronounce only on the law as pleaded, the result must be an independent decision based upon some extrinsic criteria since the law is in dispute. The author's thesis is true, in so far as questions of domestic law are concerned (a problem which he does not examine), for these are treated as questions of fact; but even then, the court cannot avoid making a judicial pronouncement in favour of or against a view of domestic law put forward by a party. However, in the operative part of the judgment it cannot go beyond the claims framed by the parties. The remaining two chapters deal with the burden of proof and with the taking of evidence and its admissibility. The conclusion that international tribunals are not subject to any formal rules bearing on these topics is supported by ample evidence, and thus supplements the findings, put forward in 1955 by Sereni, to the effect that there are here no general principles of law recognized by the domestic law of nations which are binding upon international courts.

K. LIPSTEIN

*Étude des accords de siège conclus entre les organisations internationales et les états ou elles résident.* By PHILIPPE CAHIER. Milan: Casa Editrice Dott. A. Giuffrè, 1959. 449 pp. Lire 2,500.

Even if this book had confined itself strictly to the narrow subject indicated in the title, it would still have been valuable. Actually, it has a considerably wider scope than the title suggests, since the author, by way of introduction to his study of the 'Headquarters agreements' made between a number of international organizations and their respective host States, devotes more than half of the book to more general questions, such as the juridical status of various types of international organizations and the immunities and privileges enjoyed by these organizations and their agents.

The author's definition of an international organization may be translated as follows: 'A legal entity created by States for a definite purpose, and possessing a will of its own, which it expresses through its own permanent organs'. On the difficult question of personality, the author takes the view that, when a collectivity has its own interests and an activity separate from that of its members, and is organized in such a manner that it can express its collective will, it has a real existence as a moral person and is more than just a fiction recognized by an external legislator. He emphasizes, however, that in order to be a subject of a legal system it is necessary to possess rights and duties under that

system directly, and not merely through the agency of intermediaries. But basic to M. Cahier's approach is the distinction which he draws between subjects of international law and international legal persons. In order to be a subject of international law, it is necessary only to be regulated by a norm of international law—and a single norm will suffice. Conversely, in order to possess full international legal personality, it is necessary to have an object and a will; to possess powers and an organization; and even to take part in the creation of rules of international law. In between these two categories the author recognizes the existence of international legal persons with a limited capacity. The majority of international organizations fall into this third category, though a few (e.g. the United Nations) may rank as full international persons.

Having erected his doctrinal framework, the author proceeds to discuss the development of international institutions, culminating in the United Nations and its specialized agencies. Other intergovernmental organizations, such as N.A.T.O., the Organization of American States, and the various European institutions established in recent years, are also studied. Having studied these organizations in a general way, the author examines in some detail the position as regards their respective privileges and immunities. Finally, he analyses the various headquarters agreements, and in the last chapter he proposes a standard form for such agreements.

The author is to be commended for the clarity of thought which he brings to bear upon a somewhat difficult and uninspiring subject. It is not surprising, perhaps, that from time to time he confesses himself impatient with the vague concepts and obscure drafting frequently employed in the constitutions of international organizations and in headquarters agreements. Among the latter he particularly commends the agreement between Austria and the International Atomic Energy Agency, and that between Italy and the Food and Agriculture Organization. In general, however, he criticizes headquarters agreements for being too long and confused. The effect, he thinks, of these agreements going into too much detail is to prevent the emergence of general principles which should be common to all international organizations. Consequently, he favours a standard type of headquarters agreement containing general principles only, with all the detailed articles rendered necessary by local conditions relegated to an annex. He is also critical of unthinking use of such terms as 'extritoriality', and even 'diplomatic immunities', in headquarters agreements.

The book contains a useful bibliography and a number of appendixes. In the latter are to be found a list of general conventions relating to the privileges and immunities of international organizations; a list of headquarters agreements; and a list of agreements and resolutions forming the constitutions of international organizations.

D. H. N. JOHNSON

*The Modern Law of Land Warfare.* By MORRIS GREENSPAN. Berkeley and Los Angeles: University of California Press (Cambridge University Press), 1959. xxiv + 724 pp. £3. 15s.

It will be generally admitted that the need for a new and systematic work devoted to the Law of War is both real and urgent. Mr. Greenspan, a member of the English Bar and now a United States citizen, has attempted to meet this need by a substantial work devoted to the Law of Land Warfare. He has stated his purpose in the opening sentence of the preface. It is 'to present an accurate, comprehensive and systematic statement of the international law of war as it exists today'.

The sequence and titles of the nine parts into which the book is divided give some indication of the writer's approach to the subject and to the method of exposition. These titles are: 'The Place of Law in War—The Commencement of War and its Participants—The Victims of War—Enemy Territory and Property—Hostile and Nonhostile Relations of Belligerents—The Enforcement of the Laws of War—Neutrality—Termination of War—Armed Conflict not of an International Character'. The text is followed by six appendixes, five of which are the annexes to the Geneva Conventions of 1949 and the sixth consists of the unratified Hague Rules of Air Warfare of 1923.

The arrangement is, in the main, orthodox and does not call for comment. Some criticism, however, is evoked by the claim to modernity and comprehensiveness. The preface is dated 'January 1959' and yet the references throughout the book to Oppenheim, volume 2, are almost invariably to the sixth edition of that work which appeared in 1944. Nevertheless, the seventh edition of that work, published in 1952, appears in the bibliography (p. 691). There are also numerous references in the footnotes to the last but one version of the British and United States Manuals of the Law of War on Land, dated 1941 and 1940 respectively. Both of these official publications have been revised, the former in 1958, and the latter in 1956. These latter versions appear in the bibliography but their earlier counterparts are cited with a frequency which is surprising in a work appearing in 1959.

The author has paid considerable attention to the many important and extensive changes made in the law governing the treatment of war victims by the four Geneva Conventions of 1949. He devotes the longest Part (III) to a recital of their provisions. Indeed, he makes claims for their efficacy and satisfactory disposal of legal difficulties that will not command universal assent. It is true that the fact of their establishment and ratification by seventy-seven States is a great achievement in the extension of the domain of the Law of War in the humanitarian field. A consideration of the difficulties encountered in their practical application to situations since 1949, and of the uncertainties inherent in many of the Articles themselves, should find a place in any book that seeks to be comprehensive. Mr. Greenspan is such a consistent advocate of the merits of these conventions that one is all the more surprised to find no reference in the text, footnotes or bibliography to the four volumes of Commentaries published by the International Committee of the Red Cross at Geneva during the years 1952 to 1959. These works comprise, in all, some 2,000 pages of exhaustive comment upon the history, purpose and meaning of each of the 417 Articles contained in the conventions. They are, it is suggested, an essential source of material for writers in this field as well as an indispensable guide to all who are concerned with the practical application of a substantial part of the modern Law of War. It is in the light of this omission that one must assess the value of the following statement which appears on p. 267 of Mr. Greenspan's book: 'It may be stressed again that the (Geneva Civilians) convention of 1949 merely lays down norms of behaviour that the civilized world had already recognized as binding upon the conduct of warfare.' It may be recalled that one of the purposes of concluding these conventions was to remedy the defects in the Law of War revealed by the experiences gained in the recent war.

Those parts of the book which are concerned with the theoretical or jurisprudential aspects of the subject are in the main less satisfactory than those which deal with the more detailed rules of law and their practical operation. The author has much to say that is useful about the law of belligerent occupation of enemy territory and many of his observations could well find a place in an official manual written for the guidance of Military Government staff officers. He does not seem to be fully aware of some of the difficulties inherent in the legal theory of occupation, particularly when he comes to



consider the situation prevailing in Germany from 1945. He appears to take the view (p. 216, note 25) that the victorious belligerent in control of enemy territory at the close of hostilities must be an Occupant bound by the Hague Regulations of 1907 unless the territory in question has been annexed by that belligerent. This would seem to be too rigid an approach and one that is not supported by the consensus of writers. Little weight is given, in the context of the legal régime in post-war Germany, to the fact of unconditional surrender, which has been seen by some as the root fact from which the legal consequences flow and, in the matter of the status of Berlin, are still flowing.

The treatment of the considerable volume of case law established by the various war-crime tribunals after the recent war constitutes one of the most valuable and informative portions of the book (Part VI, pp. 418-502). There is, perhaps, a tendency to extract more law from some of these decisions than they will properly yield. Apart from the restricted role of precedent in international law it is well to remember that many of the military tribunals gave no reasons for their decisions. Even where a judge-advocate sat with such a tribunal he proffered advice upon, but did not decide, the legal issues. One would have wished that he had paused longer over the legal bases of the different jurisdictions exercised over war criminals. Each type of jurisdiction exercised raised questions of considerable legal complexity and of interest to the student of the Law of War. The debatable matter whether international tribunals such as those which sat at Nuremberg and at Tokyo will in future be able to exercise a war-crimes jurisdiction within the framework of the contemporary Law of War is not discussed. In the case of 'grave breaches' of the Geneva Conventions of 1949 and of contraventions of the Genocide Conventions of 1948 such a jurisdiction would appear to be precluded. It is also a matter of regret that the legal difficulties underlying the criminality of espionage, war treason, sabotage and guerilla activities are not explored. It is particularly in this branch of the Law of War that some attempt at legal analysis, whether of the substantive obligation violated, or of the jurisdiction exercised, might have been rewarding. Little progress in this important subject seems to have been made since Professor Baxter advanced the conception of 'unprivileged belligerency' as a possible hypothesis in the pages of this *Year Book* in 1951.<sup>1</sup>

It cannot be said that Mr. Greenspan carries the discussions concerning the legality of the use of nuclear and thermonuclear weapons any further. He makes a number of statements about the scientific effects of these weapons, with little hint of the controversies that have attended, and still are attending, them. The crucial legal distinction between illegality *per se* and illegality in regard to the circumstances of each particular user is not discussed. It is curious to observe the consistency with which writers continue to address their minds to the legality of releasing atomic and hydrogen bombs from manned aircraft. In a modern treatise attention might also be paid to the use of guided missiles with thermonuclear war-heads launched from a range of 5,000 miles and capable of being delivered within 2 miles of the selected target. Such seem to be the facts to which the jurist must endeavour to apply such rules of law as exist upon the subject.

The broader defects of the book lie in its avoidance of the theoretical and fundamental controversies that pervade much of the Law of War. The place of the individual as a holder of rights and a bearer of duties flowing directly from international law is a central question for the Law of War. If the individual has international law duties, to whom does he owe them? If he has international law rights, which seems to be less generally conceded, against whom do they lie? How will the Law of War be applied to International Military Commands, and can it be applied as it stands to an international force

<sup>1</sup> 'Spies, Guerillas and Saboteurs', this *Year Book*, 28 (1951), pp. 323-45.

not composed of national contingents? How is the acute contradiction between the law governing the treatment of war victims and that governing the actual conduct of hostilities to be reconciled? Have the Geneva Conventions of 1949 been largely nullified by the *lacunae* in the Hague Regulations of 1907 and the Geneva Gas Protocol of 1925 as to what weapons may be used and when they may be used? Some discussion of these and other controversial topics might not have been out of place. Apart from the anachronistic nature of much of the Law of War there is a distressing lack of certainty and of coherence among the rules themselves. By a detailed analytical approach to the principles and rules of the Law of War the writer can assist in the preparation of the extensive revision and modernizing which is so urgently required in this important subject. This, it is thought, is likely to be a more rewarding activity than the paraphrasing of the detailed provisions of conventions the texts of which are easily procurable by the reader. Such may be the discipline required of the writer of the official manual whose task is to provide an authentic work of guidance for military officers, but there are more stimulating and creative possibilities for the writer of the textbook. It is perhaps the major criticism of Mr. Greenspan's work that he has produced such a manual when he set out to give us a treatise, and that in so doing he has not penetrated the subject in sufficient depth.

In spite of these observations it must be said that Mr. Greenspan has produced a work of considerable informative value both to the student and to those concerned with the practical application of the Law of War on Land. He has placed at our disposal a wealth of material about a difficult and recondite subject and to that extent the student and the practitioner must be in his debt.

G. I. A. D. DRAPER

*The Use of International Law.* By PHILIP C. JESSUP. Published by the University of Michigan. 1959. xiii + 164 pp.

This short book, containing the five Thomas M. Cooley Lectures delivered by Professor Jessup in the University of Michigan in 1958, is as full of meat as an egg, but not the curate's egg, as I find it uniformly edible. It aims at answering two questions, 'Is International Law used?' and 'What use is it?' It assumes that these questions are put both by laymen and by lawyers, and it is consoling to a British lawyer to find that in the United States of America, as here, there are many legal practitioners who are sceptical of the existence of international law and 'incredulous when told that a lawyer can make a living practising it'—which occurs more frequently in the United States than in the United Kingdom. The first lecture examines the scope and character of 'The International Community Subject to the Law', formerly and today, and observes that 'The "international community" should now be used as a term descriptive of a large number of political entities enjoying varying degrees of political independence and of economic self-sufficiency, plus various collectivities or organizations in which those entities are grouped for certain purposes.' Professor Jessup rightly rejects the exaggerated claims made for international law by many who fail to realize the difference between law and politics and claim for international law a degree of universality in respect of the issues that can and do arise between States. Its role at present may be comparatively modest, but its potentialities are great.

In Chapter II, 'Procedures of Settlement', he describes the use made of it as a means of adjusting conflicting national interests by way of negotiation and conciliation, including resort to the *amiable compositeur*. In doing so he invokes some analogies from the

sphere of labour-management relations and negotiations between great commercial and industrial corporations, and draws attention to the activities of the Secretary General of the United Nations and other representatives of that body in the process of adjustment. Turning to 'Processes of Decision', he refers to the fact-finding activities of Commissions of Inquiry (as in the Dogger Bank affair) and the law-finding activities of the International Court. He deals, somewhat briefly, with the enforcement of the decisions of the International Court and other international tribunals, a matter which gives more concern to the layman than to the lawyer. As he points out, it is quite exceptional to find a State failing to comply with a judgment given against it. The enforcement by the Security Council of the judgment in the *Corfu Channel* case, which he mentions, would have involved a number of political factors. From the international lawyer's point of view the crucial thing is the consent of two States to refer a dispute to arbitration or adjudication; when they are willing to do that, a refusal to comply with an award or judgment is exceedingly rare. Then follow some important pages on 'Consent to Adjudication', in which the American reservation excluding from the compulsory jurisdiction of the Court 'disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America' is examined in some detail. It now appears that the President desires to secure a withdrawal or modification of that reservation. Professor Jessup draws attention to the powerful Opinion delivered by Judge Sir Hersch Lauterpacht in the *Norwegian Loans* case, which did much to focus public attention upon the unfortunate effects of such a reservation, and its unexpected recoil upon States which have followed the United States of America by adopting it.

The third lecture deals with 'The Role of National Courts' in the application and enforcement of international law, and many lawyers who are not familiar with international law would be surprised to see how large that role is. An examination of the volumes of the *International Law Reports* makes that abundantly clear. Professor Jessup illustrates the importance of this role by reference to numerous decisions, mainly British and American, and discusses the extent to which these Courts rely for guidance upon the Executive in such matters as State and diplomatic immunity, recognition of new States and Governments, &c.

He then turns in his fourth lecture to 'The Role of International Courts', which include tribunals of arbitration, Mixed Claims Commissions created by pairs of States, and permanent courts such as the Permanent Court of International Justice from 1922 to 1946, and the present International Court. The volume of business transacted by Mixed Claims Commissions, that is, in dealing with claims by the nationals of one State against the other State combining to establish the Commission, and sometimes by one State against the other, is enormous and their awards run into many thousands. A commission usually consists of a nominee of each party and a 'neutral' President. Much of their work is of a routine character, but many of the awards made by them have made important contributions to international law—the importance varying according to the standing of the members. It is only by an examination of the *International Law Reports*, formerly known as the *Annual Digest*, that an appreciation of the quantity and quality of the judicial decisions and arbitral awards accruing each year from all sources can be made.

After pointing out the lack of any established appellate jurisdiction and the occasional agreement of the parties to submit an ambiguous or otherwise unsatisfactory award to another tribunal, such as the Permanent Court or the International Court of Justice at The Hague, Professor Jessup discusses 'The private plaintiff disguised' and 'The State as the actual plaintiff'. He points out that in many cases brought by one State against



another, e.g. the *Norwegian Fisheries* case, a government is indirectly protecting the interests of its nationals, and in some cases it is doing so directly, as in the *Ambatielos* case before the International Court of Justice and the subsequent tribunal of arbitration. While only States can be parties to cases before the International Court, that Court can indirectly adjudicate upon a claim by an individual against a State when his Government is prepared to espouse his claim and put it forward on the international plane.

Under the rubric 'The Record of Performance' he samples a few judgments and advisory opinions given at The Hague from the point of view of the impartiality of the judges, and comments upon the method of selecting the judges and certain proposals for improving the method.

In the fifth lecture, entitled 'Problems and Prospects,' he sums up. While indicating a number of minor measures which would facilitate and extend resort to international law for the purposes of the adjustment of, or adjudication upon, international disputes, he makes a point of capital importance not fully realized. Until the beginning of this century or a little later, arbitration was looked upon by many as something which powerful States ought, as a matter of conscience and morality, to be willing to concede to weaker States. The situation has changed.

'Larger powers [he says at p. 133] like the United States and Great Britain and France might well consider the importance to themselves which international law has, or could have, today. It has been well said that

whereas recourse to arbitration was traditionally regarded as a protection for the weak against the strong, the roles are now frequently reversed and it is often the stronger party which looks to the law for the protection of what it regards as legally vested rights and seeks arbitration or judicial settlement as a means of securing such protection. (Jenks, Preliminary Report of the Twenty-fourth Commission of the Institut de Droit International on *Compulsory Jurisdiction of International Courts and Tribunals* (1957), p. 125.)

The reason why this is true is that the United States, for example, is now inhibited from employing its military force for the vindication of its rights. Under traditional international law, a state was entitled to use self-help under many circumstances. Today, under the Charter of the United Nations, force cannot be used except in self-defense or in support of United Nations action. . . . When the United Nations was established it was thought that the old system of self-help had been replaced by a new regime of collective security enforced by the co-operation of the five permanent members of the Security Council. The difficulty is that nothing has been put in place of the bankrupt system of collective security. The Uniting for Peace Resolution and the emerging role of the General Assembly may be going to fill part of the gap. But any such development in the United Nations system which does not depend on actual overwhelming force as contemplated originally under Article 43 of the Charter, must depend on other pressures among which a sense of legal compulsion can be important.'

A further section of this lecture, 'The New Frontier of Science and Organization', demonstrates the challenge to international law and lawyers which is made by the immense leap forward in scientific discovery and the urgent need of controlling its results—space, Antarctica and similar problems.

This seems a long review of a short book, but one could not do justice to the book with less. There is no living international lawyer who has had the opportunities that Professor Jessup has had as Deputy Chief of the United States mission to the United Nations and Ambassador at Large from 1948 to 1953, of estimating the usefulness, the limitations and the difficulty of the application of international law. That experience of public service, combined with his deep knowledge of his subject resulting from many years of study and teaching and research, gives a particular importance to this book.

It is extremely practical and up to date and is written with restraint and a sense of realism, while being at the same time forward-looking and inspired by faith. It is just the book which international lawyers should urge their colleagues who are not international lawyers to read and ponder; in my opinion it indicates admirably where we now are and in what direction we ought to go. International law, both as a professional study and as an instrument available to Governments, has at least four centuries behind it. It has advanced and will continue to advance step by step, and not dramatically at a great international conference. Its principal need is the greater understanding and support of the lawyers of every country—judges, practitioners and teachers. At any rate, that is the main impression of Professor Jessup's aim and desire that I derive from this excellent book.

McNAIR

*Sull' Interpretazione dei Trattati nel Diritto Internazionale.* By SERGIO NERI. Milan: Giuffrè, 1958. xxv+309 pp. Lire 2,000.

The interpretation of agreements has for a long time attracted the interest of international lawyers who have discussed this question as part of the law of treaties. In domestic law, the problem of interpretation has taken two forms, at least in civil law countries, where the technique of interpreting statutes has become the preserve of jurisprudence, while that of interpreting contracts has remained neglected. In common law countries, the methods of interpreting statutes and documents have been developed on parallel lines. Further, the aims of statutory interpretation must be different in civil and in common law countries. Here, gaps are filled by the common law; there, the solution must be found within the framework of the statute. Finally, the interpretation of private law agreements must present different tasks in civil and common law systems. Here, the agreement itself must provide the terms of the engagement, except where implied terms and subsidiary rules, such as those embodied in the Sale of Goods Act, fill the gap. There, the supplementary rules of the Codes constitute a *droit supplétif*. Its existence eliminates more or less the usefulness, for the purpose of interpreting treaties, of municipal techniques for interpreting contracts. Similarly, the civil law methods in interpreting statutes by way of statutory or legal analogy cannot assist, since they start from the idea of a complete and closed legal system, and only the technique of relying on *travaux préparatoires* helps. Consequently, the author's discussion as to whether a distinction can be drawn between law making and other treaties (about which he has much of interest to say) is strictly irrelevant. It follows that the common law alone can provide apposite analogies. Whichever legal system is considered, its rules of interpretation operate within the legal system and are thus created, and possibly controlled, by the law itself.

The author, who was able to rely on a considerable body of literature and practice, attempts to show that the interpretation of treaties is also determined by techniques which have not only been created by courts, but which constitute legal principles themselves and are not merely logical and literal devices to elucidate the psychological attitude of the parties. He examines, first, the maxim that a clear text does not require interpretation and finds fault with the formulation of the maxim itself, since a dispute over its wording discloses that the text is not clear. However, he fails to appreciate that certain terms bear a technical, well-established meaning and that the *Golden Rule* (*Mattison v. Hart* (1854), 14 C.B. 357 at p. 385) developed by English law merely operates to exclude an absurd result. It must be admitted that when both parties disagree with the clear meaning of a text, the maxim cannot apply, but in these circum-

stances the partners were never *ad idem*, and mistake in the conclusion of the contract is being alleged. Thus it appears that a dispute involving a clear meaning, relied upon by one party and opposed by the other, or involving an obscure text, can alone invite and require interpretation. Where the text is obscure it follows, of necessity, that extraneous matters must be considered in order to establish a reasonable and clear meaning. Where the meaning is *prima facie* clear, but disputed, the problem presents itself in its neatest form. It is whether in these circumstances the arbitrator, tribunal or court, can go beyond the clear text. The author shows that, in this respect, the practice of arbitral tribunals (including the mixed arbitral tribunals set up under the peace treaties after the First World War) differs from that of the Permanent Court of International Justice and of its successor. Tribunals set up by the parties are more willing to probe into the common intention of the parties than courts *stricto sensu*. In addition the author examines whether a clear text can be supplemented by extraneous evidence to change its meaning. Although the author considers this question as being one of interpretation, it does in reality raise a different issue, which is not one of interpretation but of evidence. It is therefore not surprising that, in keeping with municipal law, international courts and tribunals have been unwilling to admit such evidence and have been reluctant to examine it *ex officio*. The final chapter dealing with the forms of extrinsic evidence which may be taken into account contains much interesting material and many shrewd observations on the relevance of the historical and legal circumstances surrounding the conclusion of the treaty in dispute, of the various elements which make up the *travaux préparatoires*, of unilateral declarations and measures to bring the treaty into operation according to domestic law and of the admissibility of the evidence to be given by the negotiators of the treaty itself.

The author has chosen a subject which is of perennial interest. He has handled an immense mass of material with care and perspicacity, and he has analysed the theoretical literature with critical acumen. His own conclusions are less revolutionary than they would appear at first sight. In particular his failure to perceive that the main object of his investigation, namely the problem of whether a clear text may be supplemented, amended and altered by extrinsic evidence, involves a question of evidence, and not of interpretation, colours the treatment of this important aspect of the book and bars the way to a constructive solution.

K. LIPSTEIN

*Le Rôle des organisations internationales en matière de prêts et d'emprunts.*  
By JEAN SALMON. Stevens & Sons Ltd., 1959. xix + 366 pp. 42s.

Published in French under the auspices of the Carnegie Endowment for International Peace, this book is another example of the enterprise both of the Foundation and the publisher.

The author is Belgian and was, for some time, adviser to the United Nations Relief and Works Administration in Beirut. The work won the first prize in 1957 in the annual competition organized by the Foundation for studies in international organization. After an introductory description of the main forms of international loans, the book is divided into three main parts.

The first is an historical survey of the practice as borrowers or lenders of a number of international institutions, namely, the European Danube Commission, the League of Nations, the United Nations, the International Bank for Reconstruction and Develop-



ment and its affiliate the International Finance Corporation, the European Coal and Steel Community, U.N.E.S.C.O. and the World Health Organization.

The other two parts of the book are devoted to the legal problems common to international organizations engaged in lending or borrowing. They consider in turn questions of legal personality; the law governing international organizations and their action; their competence in the lending and borrowing field and the negotiation of loan contracts by them; the guarantees provided for lenders and the legal régime governing the contracts of loan. All these questions are examined in relation to each of the institutions named.

The author's analysis of the questions he poses is acute and the questions themselves well chosen. The book may perhaps be criticized on two grounds; first, while the choice of institutions for such a study is, of course, difficult, depending, as it does, on limiting terms of reference, there is at least one important omission. Secondly, it is doubtful whether it is possible within the space allotted both to describe fully the lending and borrowing functions of the institutions studied and to answer adequately the often difficult questions they pose.

As to the choice of institutions for study, the borrowing by U.N.E.S.C.O. and the abortive plan to borrow by the World Health Organization, for the erection of their headquarters buildings are hardly interesting save in so far as they raise the question of the implied power of an international organization to borrow, but the author deals with this question in a very summary way, and while he makes the distinction between the implied power of an international organization to build headquarters offices for itself, as being necessary to its very existence, and an implied power to borrow money for the purpose, he does not make the distinction, important at this point, between those international organizations such as I.B.R.D. and I.M.F. which earn money by their operations and those which depend entirely on members' contributions. In the former case, the power to borrow for the purpose, for example, of erecting a headquarters building can be more easily derived. A further aspect of implied powers which might also have been dealt with is the power of an international organization to raise money for its administrative use by investment of assets in, for example, Treasury bills. A number of international organizations have investment programmes of this kind.

Coming back to the choice of institutions, the reader is surprised that there should be no more than incidental mention of the International Monetary Fund in a study of this kind. It is true, of course, that the Fund might be excluded on the ground that it does not lend money in the strict sense, a drawing from the Fund by one of its members being technically a purchase and sale of currency. However, the transaction has much the same economic effects as an international loan and also some of its legal characteristics. Further, the I.B.R.D. and I.M.F. were planned in 1944 as complementary to each other, and membership in the Fund is a pre-condition of membership in the Bank. For both reasons fuller consideration of the I.M.F. might have been expected.

The only substantial comment on the Fund occurs in the discussion of the functions of international organization in smoothing the path of foreign investment, where it is said, '*Le F.M.I. assure, dans certaines limites, la stabilité des monnaies et des garanties contre la dévaluation*'. This statement would need much elaboration; for it is not true that the Fund provides any assurance to a foreign investor against devaluation: indeed, the Fund may, and sometimes does, recommend devaluation as the only cure for a country's economic ills. Further, it is often a condition of drawing from the Fund that the member shall not use the currency obtained in order to counter fundamental trends in the exchange market.

Extended discussion of the B.I.S. is excluded on the ground that as an association

of Central Banks it does not have the same inter-governmental character as the other institutions surveyed. However, the broad relations between the B.I.S. and the European Coal and Steel Community are considered in some detail. There is, however, only slight mention of the European Payments Union, which was an important source of credit to its participants fifteen months ago, though the European Monetary Agreement which has taken its place is playing a lesser role in this respect.

The need for compression dictated by the size of the book has also meant that interesting or important topics are dealt with very briefly; for example, the account of the clearing of the Suez Canal by the United Nations and the raising of money for hire of salvage vessels and equipment and to pay their operators omits important details. First, the final General Assembly Resolution is not mentioned, which called for a *voluntary* surcharge of three per cent. on canal dues to be paid by the users into a special United Nations Account which would be in turn devoted to meeting the cost of the clearing. This, given the circumstances in which certain countries offered contributions to the United Nations to meet the cost, at least raises the question whether their contributions can be regarded as a loan to the United Nations at all. Secondly, it is concluded from the analysis of the United Nations' power to raise money for administrative or other purposes that the sole source of authority is the Sovereign Act of the General Assembly, but no mention is made of Article 104.<sup>1</sup> It was in virtue of this provision that Article 1 of the Convention on the Privileges and Immunities of the United Nations attributed to the United Nations the capacity, among other things, to acquire and dispose of immovable and movable property. It is believed that this would include the power to raise money at least for administrative purposes.

In conclusion, it may be said that while the book shows imagination and scholarship, many of the topics raised call for far fuller treatment than they receive. The book has a useful bibliography and an appendix containing ten typical loan agreements, several of them relating to the European Danube Commission.

J. E. S. FAWCETT

*International Arbitration.* By J. L. SIMPSON and H. FOX. London: Stevens & Sons Ltd., 1959. xx+330 pp. Price 45s.

This book, like the earlier books by J. H. Ralston and by K. S. Carlston, covers not only arbitration *stricto sensu* but also judicial settlement by standing international tribunals such as the International Court of Justice. In their preface the authors justify the writing of a new book on international arbitration on two grounds. First, a broad survey of international tribunals had not yet been attempted by anyone in the English language since the end of the Second World War. Secondly, it seemed to them that the time had come to take stock of the position in the light of a number of important decisions by the new Hague Court, and of important *ad hoc* arbitrations, of the establishment of several new international tribunals and of the preparation of Model Rules on Arbitral Procedure by the International Law Commission. In fact, however, they scarcely needed these justifications. For their method—that of an analytical and closely compressed textbook—is rather different from that of their predecessors, and undoubtedly there was room for a book of this kind.

The book opens with a rapid historical review of the development of international arbitration from 1794 onwards, which sets out briefly all the main stages and which

<sup>1</sup> 'The organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes.'

should provide a useful introduction for students. There follows a short chapter devoted to 'Modern International Tribunals' which describes in outline the constitution of the International Court and discusses very briefly some post-war tribunals and, in particular, the tribunals created under the Agreement on German External Debts and the Bonn Conventions relating to the Termination of the Occupation Régime in the Federal Republic of Germany. For reasons of space the description of the Court is somewhat sketchy, while the account of post-war tribunals is selective and incomplete. Nothing, for example, is said of the Court of Justice of the European Communities nor of the European Commission and Court of Human Rights. The authors explain in their preface that the former has been omitted as being a topic for writers with readier access to primary sources and that the latter two tribunals cannot be put in proper perspective except in a specialized work on human rights. Clearly, it is impossible to deal with every tribunal in a book of some 300 pages and the primary sources for these European tribunals were not fully available when the book was written. Nevertheless, they are of considerable constitutional and academic interest and it will be a pity if some room cannot be found for them in the next edition. The point is perhaps reinforced by the fact that the Pan-American Union has under consideration proposals to set up a Human Rights Commission and Court on the European model but with interesting variations.

The third chapter, the longest in the book, examines the 'Bases of International Jurisdiction' and contains a succinct statement of the principles and problems of international jurisdiction. The fullest and most interesting part is perhaps that on a tribunal's jurisdiction to decide questions relating to its own jurisdiction. After two short chapters on the 'Establishment of Arbitral Tribunals' and on the 'Parties' there follows in Chapter 6 an account of the 'Conditions of Preferment of Claims'. This chapter covers five main topics: espousal of claims, exhaustion of local remedies, the Calvo clause, the effect of delay in presenting the claim and the extent to which diplomatic negotiations are a necessary preliminary to the presentation of a claim. There is a good account of the effect of the Calvo clause in contracts and concessions, but some mention might perhaps also have been made of the statutory clauses found in some Latin-American constitutions. In discussing the local remedies rule the authors, understandably enough, base themselves very largely on the pronouncements in the well-known *Finnish Ships* and *Ambatielos* arbitrations. It seems to the reviewer, however, that these two arbitrations are allowed to dominate the exposition of the rule too completely and that in consequence some of the points which arise in applying the rule do not emerge very clearly. There is no mention even in a footnote either of the Permanent Court's decision in the *Panevezys-Saldutiskis Railway* case or of that of M. Uden in the *Forests of Central Rhodope* arbitration.

Chapter 7 deals with the 'law applicable' and includes a discussion of the effect of a direction in a compromis to apply 'law and equity', the sources of law in Article 38 (1) of the Court's Statute, jurisdiction to decide *ex aequo et bono*, *non liquet* and the treatment of municipal law by international tribunals. It is a large order to attempt to pack an account of all these questions into a mere eighteen pages, and the attempt is not completely successful. While there is much information in this chapter, the exposition would have gained by a more systematic treatment of the various subjects. Thus, the problems involved in 'general principles of law recognized by civilized nations' might have made a clearer impression on the reader if the treatment of this source had been a little more systematic and precise.

The next nine chapters cover such matters as procedure, interlocutory proceedings, including preliminary objections, counter-claims, intervention by third parties, evidence, settlement out of court, discontinuance, judgments and awards, *res judicata*, rectifica-



tion, revision and interpretation of judgments, appeals and execution, advisory opinions and summary procedure. These chapters, each of them quite brief, contain a surprising amount of detailed information, which is not easily found elsewhere in such a simple and usable form. They should serve as a workmanlike guide to anyone wanting to look up quickly the procedure and practice in these matters. The chapter on counter-claims and modifications of the claim is perhaps of particular interest. The last chapter, entitled 'Administrative Matters', touches very lightly upon the question of languages, the financial aspects of international arbitration, the publicity of the proceedings and the secretariat of the tribunal. Finally, the text of the International Law Commission's Model Rules on Arbitral Procedure is added in an appendix.

The book is designed as a manual of the law and practice of international arbitration rather than as a textbook or as a student's introduction to international arbitration. Students will find some parts, such as the historical chapter, the chapter on 'Bases of Jurisdiction' and the section on 'Interim Measures of Protection', useful to them. In general, however, the material is too close-packed to be easily digested by students. As a practitioner's handbook, however, the book has merits. A considerable amount of information and comment has been compressed into a brief space while the liberal footnotes contain references to a very useful range of authorities. A 'manual' cannot, of course, supply answers to every question. It can only deal with the more common and the more significant problems and, in addition, indicate to the reader where he is likely to find the answers to more detailed questions. The present book would, it is thought, be even more helpful to practitioners if at the head of each chapter, rather in the manner of Oppenheim-Lauterpacht, there were set out the principal authorities to which the reader should refer for more detailed information. As it is, the reader is scarcely made aware of the importance of Hudson's book on the Permanent Court or Rosenne's on the new Court or of Ralston's *Law and Procedure of International Tribunals*, while he will not find anywhere in the book any reference to Sandifer's *Evidence before International Tribunals*.

A great deal more work goes to the writing of a manual than ever appears on the surface and the present book bears ample evidence of close study and wide research. It is to be welcomed as an introduction to the law and procedure of international arbitration and a serviceable handbook for practitioners in that field.

C. H. M. WALDOCK

*Le Riserve nei Trattati*. By EDOARDO VITTA. (Memorie dell'Istituto Giuridico, Università di Torino, ser. II, No. XCVII, 1957.) Turin: G. Giappichelli. 145 pp. Lire 1,400.

*Studi sui Trattati*. By EDOARDO VITTA. (Memorie dell'Istituto Giuridico, Università di Torino, ser. II, No. CI, 1958.) Turin: G. Giappichelli. 100 pp. Lire 1,100.

*Reservations in Treaties* provides a comprehensive systematic account of the various types of clauses limiting or excepting the duties of a contracting party to an international agreement and of their place in a system of international law. The opinion of the International Court of Justice in the *Case of Reservations to the Genocide Convention* is analysed in some detail, and the conclusion is reached that the Court, instead of searching for and establishing a legal principle, which defines the powers of reservation, has relied on the technique of interpreting the intention of the parties. As a result, the

hypothetical intention of the parties is made to yield an implied catalogue of admissible and inadmissible reservations which cannot be usefully administered in practice. The suggestion to draw a distinction between treaties establishing or confirming general rules of law and other treaties is not followed up sufficiently, although it may provide at least one possibility for extending the principle established by the International Court of Justice to situations other than that arising under the Genocide Convention itself, contrary to the view taken by the General Assembly in Resolution 598 (VI) of 12 January 1952. Similarly, the reference to the increasing practice of providing for majority rule in international organizations might have been expanded to include an examination of the question whether, in so far as membership of such organizations is concerned, the individual acceptance or refusal to accept a reservation is confined to the parties founding the organization.

*Studies in the law of Treaties* has a more limited scope than the title suggests. The author discusses a number of theoretical problems of general importance in the law of treaties, among them primarily that of their binding force. Adhering to Ago's view of the spontaneous creation of rules of international law, he combines with it the theory (professed some thirty years ago by Burckhardt) that treaties like contracts constitute law-making processes of a secondary character, delegated to the parties by the law itself. However, there is one fundamental difference. The freedom of contract is controlled by detailed provisions of the general law, while the autonomy to enter into treaties appears to be practically unlimited, except in regard to treaties which are inconsistent with previous treaty obligations, but this problem is not developed in detail by the author. Instead he concentrates on a particular type of treaty, namely, that creating new subjects of international law and international organizations. His conclusion that such treaties are preparatory only until the entity has in fact come into being adds little new. The final section purports to deal with some recent developments and concerns the law-making character of treaties as well as the function of the majority rule in international organizations. The character of so-called international legislation has been frequently discussed in the Anglo-American world, where it is agreed that the terminology is only useful to describe the substance, though not the form of such treaties. Concentrating on the formal content, the author denies it any legislative force, but concedes that such treaties may advance or confirm customary international law. On the basis of the same contractual principle, he is able to dismiss the majority rule as a novel development on the ground that the rule itself presupposes the consent of all parties to the organization.

K. LIPSTEIN

## TABLE OF CASES<sup>1</sup>

- Aargauische Hypothekenbank Case (Swiss Confederation *v.* Federal Republic of Germany), 89
- Adams *v.* National Bank of Greece and Athens, S.A., 65, 68-69, 75, 80-81, 82
- Administration of Posts and Telegraphs of the Republic of Czechoslovakia *v.* Radio Corporation of America, 55
- Admission to the United Nations: *see* Admissions Case
- Admissions Case (first), 183; (second), 183
- Aerial Incident of 27 July 1955 Case (Israel *v.* Bulgaria), 85, 89, 92-94, 96, 99-100
- Aganoor's Trusts, *In re*, 62, 64, 65, 69-70, 72, 75
- Alsing Case, 54-55
- Ambatielos Case (Greece *v.* United Kingdom), 89, 94, 99-100, 183, 201, 206
- Anglo-Iranian Oil Company Case (United Kingdom *v.* Iran), 51, 87, 183
- Anglo-Norwegian Fisheries Case: *see* Norwegian Fisheries Case
- Antarctica Case, 184
- Armitage *v.* Attorney-General, 62, 269, 270
- Arnold *v.* Arnold, 63, 63-64, 267
- Assurantie Compagnie Excelsior *v.* Smith, 262
- Asylum Case (Columbia *v.* Peru), 142, 183, 203, 229-30: *see also* Haya de la Torre Case
- Austro-German Customs Régime Case, 5
- Banco de Vizcaya *v.* Don Alfonso de Borbón y Austria, 68
- Bank voor Handel en Scheepvaart N.V. *v.* Slatford, 69
- Bennett *v.* People's Republic of Hungary, 239
- Bonython *v.* Commonwealth of Australia, 41, 42
- Brophy, *In re*, 77
- C. (An Infant), *In re*, 260-5
- Carr *v.* Carr, 267
- Carrera *v.* Carrera, 263
- Cassirer *v.* Japan, 239-40
- Certain Norwegian Loans Case: *see* Norwegian Loans Case
- Chesterman Trusts, *In re*, 79
- Cheuk Gar Lim, *Ex parte*, 263
- Chorzów Factory Case (Germany *v.* Poland), 85
- Companai de Transportes de Gelabart, *In re*, 245
- Corfu Channel Case (United Kingdom *v.* Albania), 87, 89, 183, 212
- Cutting Case, 185
- Desranges Case, 125
- Diverted Cargoes Case, 36
- Duke of Marlborough *v.* Attorney-General, 273
- Dunne *v.* Saban, 266
- Eastern Extension Case, 139
- El Al Aerial Incident Case, 183, 184
- Elise, The*, 71
- Engelke *v.* Musmann, 261, 262
- Finnish Shipowners Arbitration, 99-100
- Fletcher, *In re*, 76-77
- Free Zones of Upper Savoy and the District of Gex, 47
- Frontier Land Case, 183
- Gardner and Co. *v.* Cone, 61
- Genocide Convention: *see* Reservations to the Genocide Convention
- Greco-Bulgarian Communities Case, 185, 189
- Guardianship of Infants Case, 183, 186-9, 190-1, 192-4, 194-6, 208, 209, 221-2
- Guerra *v.* Tissadier Case, 75
- Harrison, *In re*, 62
- Haya de la Torre Case, 142, 183: *see also* Asylum Case
- Heaton *v.* Delco Appliances Division, General Motors Corporation, 250-1
- Helbert Wagg & Co.'s Claim, *In re*, 79
- Helena, The*, 253
- I'm Alone, The* (Canada *v.* United States), 89
- Iannone *v.* Radory Construction Corporation, 251
- Indian Land Passage Case, 183, 200, 201, 203-4, 204-5, 205-7
- Injuries to United Nations Servants Case, 183
- Interhandel Case (Switzerland *v.* United States of America), 83, 89-92, 94, 98, 183, 199, 202-3, 204-5
- International Labour (U.N.E.S.C.O.) Administrative Tribunal Case, 184

<sup>1</sup> The figures in heavier type indicate the pages on which the cases are reviewed.



- International Trustee for the Protection of Bondholders A.G. *v.* The King, 41, 42: *see also* R. *v.* International Trustee for the Protection of Bondholders
- Interpretation of Peace Treaties with Bulgaria, Hungary, and Roumania: *see* Peace Treaties Case
- Interpretation of the Treaty of Lausanne, 227, 228-9
- Island of Palmas Case, 212, 251
- Jacobs *v.* London County Council, 265
- Jurisdiction of the Danzig Courts Case, 192
- Kahler *v.* Midland Bank, 67, 79
- Keyes *v.* Keyes, 64, 74
- Kornatzki *v.* Oppenheimer, 79-80
- Le Mesurier *v.* Le Mesurier, 271
- Lena Goldfields Ltd., and the Soviet Government Arbitration, 49, 55-56
- Losinger Case, 201
- Luck's Settlement Trusts, *In re*, 72
- Luna *v.* Godin Case, 76
- Luther *v.* Sagor, 253
- Lynch *v.* Provisional Government of Paraguay, 62, 64, 65, 66-69, 72, 72-73, 75, 77-78, 82
- Maldonado, *In the Estate of*, 69
- Manning *v.* Manning, 267-9, 272
- Marshall, *In re*, 76-78, 82
- Mavrommatis Palestine Concessions Case (Greece *v.* United Kingdom), 85, 88
- Memel Statute Case, 192
- Metliss *v.* National Bank of Greece and Athens, S.A., 81
- Minquiers and Ecréhos Case, 183
- Monetary Gold Case, 183, 184
- Mosul Boundary Case: *see* Interpretation of the Treaty of Lausanne
- Mountbatten *v.* Mountbatten, 62, 269-72
- Musurus, *In the Estate of*, 70
- Navios Corporation *v.* Rio Azul Compania Armadora, Panama, and Others, 251-2
- New Brunswick Ry. Co. *v.* British and French Trust Corporation, 79
- North Eastern Boundary Case, 140
- Norwegian Fisheries Case (United Kingdom *v.* Norway), 88, 140, 183
- Norwegian Loans Case (France *v.* Norway), 4, 84, 94, 98-100, 183, 186, 192, 199, 201, 208, 210, 213-15
- Nottebohm Case (Liechtenstein *v.* Guatemala), 88, 94, 183, 186, 229-30
- Panevezys-Saldutiskis Railway Case (Estonia *v.* Lithuania), 94
- Pauling *v.* McElstroy, 246
- Peace Treaties Case, 183, 219
- Perry *v.* Equitable Life Assurance of the United States, 79
- Petrocchino *v.* The Swedish State, 235
- Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi Arbitration, 43
- Philipson-Stow *v.* Inland Revenue Commissioners, 272-3
- Phillips *v.* Eyre, 71-72
- Phosphates in Morocco Case (Italy *v.* France), 87
- Pikelný, *In the Estate of*, 70-71
- Pozot's Settlement Trusts, *In re*, 73
- Radio Corporation of America *v.* The National Government of the Republic of China, 55
- Reparation for Injuries Suffered in the Service of the United Nations: *see* Injuries to United Nations Servants Case
- Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 140, 183
- R. *v.* International Trustee for the Protection of Bondholders A.G., 67, 79-80: *see also* International Trustee for the Protection of Bondholders A.G. *v.* The King
- Rights of Nationals of the United States of America in Morocco: *see* United States Interests in Morocco Case
- Rights of Passage over Indian Territory Case: *see* Indian Land Passage Case
- Robinson-Scott *v.* Robinson-Scott, 63, 265-7, 267, 268, 272
- Salem Case (United States *v.* Egypt), 95
- Salvesen *v.* Administrator of Austrian Property, 73
- Saudi Arabia and The Arabian American Oil Company (Aramco) Arbitration, 48, 55
- Schnapper, *In re*, 79
- Serbian Loans Case (France *v.* Kingdom of Serbs, Croats, and Slovenes), 41, 47, 88
- South-West Africa Case (Voting Procedure), 183, 184, 216-21 *passim*, 225-8 *passim*; (Petitioners), 183, 184, 216-21 *passim*, 230-1
- Starkowski *v.* Attorney-General, 67, 68, 72-74, 75, 75-76, 82
- Stuart, *In re*, 77, 78
- Switzerland *v.* The Federal Republic of Germany, 36
- Tallina Laevauhisus *v.* Estonian State S.S. Line, 71

## TABLE OF CASES

311

|                                                                                    |                                                         |
|------------------------------------------------------------------------------------|---------------------------------------------------------|
| Tietz <i>v.</i> People's Republic of Bulgaria, 236                                 | United Nations Administrative Tribunal                  |
| <i>Torni, The</i> , 39                                                             | Case, 183-4                                             |
| Trail Smelter Case (United States <i>v.</i> Canada), 98                            | United States Interests in Morocco Case, 183            |
| Travers <i>v.</i> Holley, 62-63, 265-7, 267, 268, 269, 271-2                       | Upper Silesia (Minority Schools) Case, 126              |
| Treatment of Polish Nationals in Danzig, 47, 185                                   | Vita Food Products <i>v.</i> Unus Shipping Co. Ltd., 39 |
| Tunis and Morocco Nationality Decrees Case, 197, 198, 199, 200, 201-3, 205         | Weinmann <i>v.</i> Republic of Latvia, 239              |
| Turkey and Iraq Frontier Case: <i>see</i> Interpretation of the Treaty of Lausanne | Wiseman <i>v.</i> Wiseman, 74                           |

# INDEX

- Adoption, 76-78
  - Adoption Act, 1950, 78
  - foreign law, effect of retroactive changes in, 76-78
- Air space, right to,
  - continental shelf, 112-113, 123
  - Panama Canal Zone, 244-5
  - U.S.A. territory, statutes to clarify claims, 245-6
- Aliens, injury to, 85, 86, 87, 89-92, 94-97, 97-101
  - assets, restitution of, 89-92
  - Harvard Research Draft Convention, 85, 95, 97
  - respondent State, link with,
    - absence of, 97-98
    - residence within territory, 97-98
    - voluntary, 94-95, 98, 99, 100-1
    - when essential, 95, 96, 97, 98-100
    - when established, 95-96
- Argentine Declaration, 1946, on epicontinental sea and continental shelf, 104, 113
- Atlantic Charter, 4
- Bagota Conference of American States, 1948, 249
- Berlin:
  - Conference of, 1885, 32
  - Restitution Court for, 235-40
- Brussels, Conference of, 1890, 32
- Cartaz*, 176-80
  - examples of, 177-8
  - Freitas on, 177, 178
  - Grotius on, 177
  - introduction of, 176
  - nature of, 176-7, 178, 179-80
- China, Communist Government of, non-recognition by U.S.A., 246-50
- Citation of International Court Decisions, the mode of, 232-5
- Ciudad Trujillo, Inter-American Conference on Natural Resources, 107-8
- Codification of international law: *see* Hague Codification Conference
- Commercial law of nations, treaties under: *see* Contracts concluded by international persons, *and* Treaties
- Commodity Agreements, International, 240-4
  - acceptance of, as condition for entry into force, 242-4
  - aim of, 241
  - dependent territories and, 242
  - duration of, 241, 242
  - Havana Charter, 1958, 241-4 *passim*
  - importing countries, safeguards of the interests of, 241-2
  - ratification of, 242, 243
  - Sugar Agreement, 1958, 240, 241-4, 257-8
  - Tariffs and Trade, Agreement on, 241, 242
  - Tin Agreement, 1959, 240-1, 241-4
  - Wheat Agreement, 1959, 240, 241-4
- Conferences, conclusions of: *see* International conferences
- Conflict of laws: *see also* Contracts concluded by international persons; Adoption; Divorce; Domicil; Marriage; *and* Wills
  - choice of law:
    - contracts, clause in, 38-40, 44
    - freedom of, 45-46, 57
    - implied, 40-41
    - rules, nature of, 64-65, 73
  - conflict mobile*, 58, 72
  - contract, proper law of:
    - choice of law: clause in contracts, 38-40, 44; freedom of, 45-46, 57; implied, 40-41
    - discharge of contracts, retroactive changes in foreign law and, 78-81
    - internationalization of contracts, 45-50, 54-56
    - law of the contracting State, presumption in favour of, 41-43
    - localization, 46
    - rights, assignment of contractual, 56-57
  - renvoi*, 65-66, 67, 82
  - retroactivity:
    - conflict rules and, 59, 60-61, 61-62, 63-64
    - foreign law, effect of retroactive changes in, 64-81
- time, conflicts of laws in, 58-82
  - adoption, 76-78
  - contracts, discharge of, 78-81
  - delictual liability, 71-72
  - intestacy, 70-71
  - judicial rules, conflict between successive, 61-64
  - marriage, formal validity of, 72-76
  - renvoi*, 65-66, 67, 82
  - statutory and judicial rules, conflict between successive, 59-61
  - statutory rules, conflict between successive, 59-61



Conflict conferences (*cont.*):

- succession of laws, a true cause of, 58-59
- wills, 66-70
- vested rights, conflict rules and, 59, 60-61
- Continental shelf, the 1958 Geneva Convention on, 102-23
  - air space above, 112-13, 123
  - Argentine Declaration, 1946, 104, 113
  - Articles of:
    - Art. 1, 106, 110, 123
    - Art. 2, 114, 115, 116, 117-18, 119, 123
    - Art. 3, 113, 118-19, 123
    - Art. 5, 119, 120-2
    - Art. 6, 119-20
    - Art. 7, 122
  - boundary, 119-20
  - Ciudad Trujillo, Conference of 1956, 107-8
  - continental slope, 104
  - definition of continental shelf, 103-4, 106-10, 113, 123
    - Convention of 1958, Art. 1, 106, 110, 123
    - depth, by reference to, 103-4, 106, 107, 107-10, 113
    - distance, 106
    - early, 103-4
    - exploitation, criterion of, 107, 107-8, 109, 110
    - geographical boundary, 107, 109
    - geological characteristics, 106, 108, 109
    - International Law Commission, Art. 67, 106, 107, 109-10
    - exploitation and exploration of, 102, 105 as criterion for definition of, 107-8, 109, 110
    - installations for, right to construct, 119, 120-2
    - 'natural resources', definition of, 117-18
    - navigation, freedom of, and, 121-2, 122
    - rights to, 111-12, 113-14, 116-19, 123
    - tunnelling from *terra firma*, 122
  - installations on, 119, 120-2
    - artificial islands, 121
    - defence purposes, 119
    - exploitation and exploration, construction for, 119, 120-2
    - navigation, freedom of, and, 121-2
    - safety zones around, 121
    - status of, 121
- International Law Commission and:
  - Articles on the Law of the Sea: Art. 67, 105, 106, 109-10, 133; Art. 68, 105, 116, 117, 118; Art. 69, 116; Art. 73, 105
  - boundary of the shelf and, 119-20

- installations on the shelf and, 121
- rights over the shelf and, 111-12, 113-15, 117
- occupation, 102-3, 116
- oil-bearing strata of, 102
- Orders in Council, 1948-54, 104
- Paria, Gulf of, Treaty of 1942, 102, 120
- Persian Gulf, Proclamations by the Rulers, 104
- res nullius*, 102, 103, 105, 116
- rights over, of the coastal State, 104-5, 110-16, 116-19, 123
  - air space above, 112-13, 123
  - Convention of 1958: Art. 2, 114, 115, 116, 117-18, 123; Art. 3, 113, 118-19, 123
  - defence, right to construct installations for, 119
  - exploitation and exploration, rights to, 111-12, 113-14, 116-19, 123
  - fishing, freedom of, 113
  - navigation, freedom of, 113, 121-2, 122
  - occupation as basis of rights, 116
  - 'sovereign rights', meaning of the term, 114-15
  - sovereignty and sovereign rights, distinction between, 114-15
  - sovereignty, claims to, 111, 113, 119
  - waters above, status of, 104, 111, 112, 113, 118-19, 123
- term, when first used, 102, 103
- Truman Proclamation, 1945, 102, 103-4, 120
- tunnelling from *terra firma*, 122
- voting on the Convention, 105-6
- waters above, status of, 104, 111, 112, 113, 118-19, 123
- Contracts concluded by international persons, 34-57: *see also* Conflict of laws and Treaties
  - international and private persons, contracts between, 43-57
    - 'Act of Pledge', 53-54
    - failure to state the law, not an indication of internationalization, 54-56
    - general principles of law, and, 44-45, 50, 51-52, 54-56
    - I.C.J., clause providing for the jurisdiction of, 50-51
    - international service, contracts of employment, 52
    - 'internationalization' of contracts, 43-45, 46-48, 50, 52, 54-56, 56-57
    - loan agreements, 50-51, 52-53
    - municipal law, contracts governed by, 41-43
    - proper law of contract and, 45-49
    - public international law, choice of, 44-45, 45-46, 50-54, 54-56

Contracts (*cont.*):

- quasi-public-international contracts and, 49-50
  - rights, assignment of, 56-57
  - international persons, contracts between, 34-41, 56-57
  - choice of law, clause, 38-40, 44
  - choice of law implied, 40-41
  - commercial treaties, 35-38, 40-41, 56-67
  - examples of, 35-36
  - municipal law, right of parties to submit to, 38-41
  - problems, methodological and other, 35-36
  - rules applicable to, existence of, 36
  - municipal law and:
    - choice of law, clause, 38-40, 44
    - choice of law implied, 40-41
    - contracts governed by, 41-43
    - incorporation of, as distinct from choice, 38-41, 44
    - 'internationalized' contracts and, 43-44, 47-48, 50, 52, 56-67
    - rights of parties to submit to, 38-41
  - public international law, when contracts subject to, 34-38, 40-41, 43-57
  - quasi-public-international contracts, idea examined, 49-50
  - rights, assignment of, 56-57
- Convention: *see* International conferences, conclusions of

Debts, German, agreement on, 36-37

Declaration: *see also* International conferences, conclusions of

Declaration of London, 9-11, 13

Declaration of Paris, 1856, 22-23

Denial of justice, 88, 95

Divorce, recognition of foreign, 62-64, 265-72

domicil, 265-7, 268-72

*lex fori*, 267-8

residence, 269-71

Domicil:

divorce and, 62-63, 265-72

intestacy and, 70-71

property, immovable, succession to, 273

property, movable:

rights of spouses to, 58-59

succession to, 67-68

wills, validity of, and, 66-70

Egypt, President Nasser's address, whether a declaration of war, 251-2

European Community for Coal and Steel, 40, 53-54, 287

European Institutions, 286-8

Exhaustion of local remedies, incidence of the rule, 83-101

claim, nature of:

*Interhandel* case, 89-92

'precise and direct statement of a claim', 88-89

significance of, for classification, 86-87, 87-88, 88-94, 100

denial of justice, 88, 95

diplomatic protection, 84-94, 94-100, 101

aliens, injury to, 85, 86, 87, 89-92, 94-97, 97-100

assets, restitution of (*Interhandel* case), 89-92

direct injury and, distinction between, 84-94, 100-1

direct injury by one State to another, 84-94, 100-1

*Aerial Incident* case, 92-94

aliens, injury to, 85, 86

ambassador, imprisonment of, 86

diplomatic protection and, distinction between, 84-94, 100-1

flag, national, injury to, 84

naval vessel, damage to, 86

officials, injury to, 87

property, State, destruction of, 87

treaties, violation of, 87

dispute, subject of, its significance for classification, 86-87, 92

respondent State, link with, 94-100, 101

absence of, 97-98

*Aerial Incident* case, 96

existence of essential, 95, 96, 97, 98-100, 101

residence, establishment of, and, 98-100

voluntary, 94-95, 98, 99, 100-1

when established, 95-96

rule:

conflict of laws and, 94-95

extension of, 98-100

well established, 83, 90

when applicable, 83-84, 94-96, 98-99, 100-1

Expropriation, 290-1

Extraterritoriality of embassy premises, 235, 236, 237: *see also* Immunity

Freitas *versus* Grotius, 162-82

*cartaz*, the institution of:

examples, 177-8

Freitas on, 177, 178

Grotius on, 177

introduction of, 176

nature of, 176-7, 178, 179-80

*De Justo Imperio Lusitanorum Asiatico*

comparison between, and *Mare Liberum*, 162-3

historical background of, 163

Grotius on, 162, 162-3

Freitas (*cont.*)

## Papal donation:

Freitas on, 168-70

Grotius on, 168, 169-70

## seas, freedom of:

Freitas on, 172-5, 181-2

Gentili on, 180-1

Grotius on, 172-5, 181

Indian Ocean, position in, at the end of the XVth cent., 170-2

## sovereignty:

occupation or discovery, acquisition of territories by: Freitas on, 167-8;

Grotius on, 167

preaching, freedom of, and, 166-7

trade, freedom of, and: Freitas on, 165-7; Grotius on, 164-5, 165-7

## General principles of law recognized by civilized nations:

application of, in contracts, 51-52

contracts concluded by international persons and, 44-45, 50, 51-52, 54, 56

*jus posteriori* and, 222-5*non-liquet* and, 126, 129, 133-4, 138, 145-7, 158, 159-60

## Geneva Conference on the Law of the Sea, 1958, 2, 16-29, 32, 33, 244

conclusions, form in which to be expressed:

Committees' on: First, 18; Second, 18-21; Third, 21-22; Fourth, 22-23; Fifth, 24-28

draft rules, no provision in, 17

General Assembly's views on, 17-18

General Committee's proposal, 18

plenary meeting on, 23-24

recommendation on, 16-17

continental shelf, the convention on: *see* Continental shelf

Final Act, 28-29

instruments adopted, 28-29

objectives, 16

procedure, draft rules of, 17-18

voting procedure, 17-18

## Germany, Agreement on German External Debts, 36-37

## Greece, diplomatic immunity in Greek law, 264-5

Grotius: *see also* Freitas *versus* Grotius *cartaz*, views on, 177

Dutch East India Company and, 162

Freitas, Grotius on, 162, 162-3

Papal donation, views on, 168, 169-70

seas, freedom of, views on, 172-5, 181

sovereignty of States, views on, 164-7

conclusions, controversy over form, 15-16

Final Act, 14-15

procedure: draft rules, 12-14; rules adopted, 14

task, 11

voting procedure, uncertainty as to, 12, 15

Hague Convention (Fourth), 1907, 256

Hague Peace Conferences:

(First), 1899, 32

(Second), 1907, 6, 32

Harvard Research, Convention on Responsibility of States (1929), 85, 95, 97

Havana Charter, 1958, 241-4 *passim*

Health Organization, World, 254

Human Rights, Universal Declaration of, 4

## Immunity:

diplomatic, extent of, 260-5

families of staff, 260-5

Greek law on, 264-5

United Kingdom and, 261-4

embassy premises, 235-40

diplomatic immunity and, 237, 239-40

extraterritoriality and, 235, 236, 237

functional usage as basis of immunity, 236-9

Restitution Court for Berlin on, 235-40

suspended, 238-9

International agreements, interpretation of, 302-3

International Bank for Reconstruction and Development, loan agreements, 38-40, 53

International Commodity Agreements: *see* Commodity Agreements

International conferences, conclusions of, 1-33

## convention:

characteristics of, 8-9, 10, 30, 31

declaration and, respective merits, 8-9, 13, 15-16, 18-21, 21-24, 27-28, 31-32

form, standard, sponsored by the U.N., 25

Geneva conference, nature of conventions adopted by, 28-29

ratification of, 9, 12-13, 19, 20-21, 21-22, 22-23, 31

resolution and, 30-31, 31-32

when suitable, 8-9, 12-13, 16-17, 18-24, 26-28, 29

## declaration:

a source of law, 10

antipathy to, 15-16

characteristics of, 8-11, 31

convention and, respective merits, 8-9, 13, 15-16, 18-24, 27-28, 31-32

## Hague Codification Conference, 1930, 2, 11-16



International conferences (*cont.*):

- ratification of, 9-10, 12-13, 15, 19-20, 22-23
- when binding, 9-10, 12-13, 15, 19-20, 21, 22-23
- when suitable, 8-9, 12-13, 18-21, 21-24, 26-28, 29
- Final Act, 14-15, 15, 28-29, 32
- forms in which to be expressed:
  - Geneva Conference on the Law of the Sea: Committees' on, 18, 18-21, 21-22, 22-23, 24-28; draft rules and, 17; General Assembly's views on, 17-18; General Committee's proposal, 18; Plenary Meeting on, 23-24; recommendation on, 16-17
  - Hague Codification Conference: controversy over, 15-16; draft rules on, 12
  - importance of, 5-6, 13-14
  - intention of the parties and, 30-31
  - legal nature of various, 29
  - London Naval Conference on, 7-9
  - summary of, 29-33
- Geneva Conference on the Law of the Sea, 1958, 2, 16-29, 32, 33
- conclusions, form in which to be expressed, 16-28
- Final Act, 28-29
- instruments adopted, 28-29
- objectives, 16
- procedure, draft rules of, 17-18
- voting procedure, 17-18
- Hague Codification Conference, 1930, 2, 11-16, 19
- conclusions, form in which to be expressed, 13, 15-16, 19
- Final Act, 14-15
- objectives, 11
- procedure: draft rules, 12-14; rules adopted, 14
- voting procedure, 12, 15
- law relating to:
  - difficulty in stating, 2
  - essence of, 2
  - treaties, law of, and, 1-2, 2-6, 30, 32
- London Naval Conference, 1908-9, 2, 6-11
- Declaration of London, 9-11, 13
- objectives, document stating, 7-9
- origins, 6-7
- protocol, 14, 15, 28, 32-33; optional, 32-33; special, 32-33
- Protocole de Clôture*, 11, 32
- recommendation, 14, 14-15, 15, 29-30
- resolution, 27-30, 30, 31-32
- vœu*, 14, 15, 29-30
- voting procedure, 12, 15, 17-18

International Court of Justice, 35, 50-51,

- 83-86, 126, 129, 145-7, 158-60, 183-231, 232-5, 294-5, 305-7: *see also* Permanent Court of International Justice
- cessante ratione, cessat ipsa lex*, affirmation of, by the Court, 216-21
- application of the principle, 216-18
- oral petitions, hearing of, and, 216-17, 218-21 *passim*
- rebus sic stantibus* principle, 217-18
- contracts, jurisdiction in, 50-51
- decisions of, mode of citation, 232-5
- domestic jurisdiction, the Court and, 197-207
- determining, criteria for, 197-8
- plea of: as a preliminary issue, 200-1; basis, 200-2
- 'provisional' principle, 201-7: basis of, 201-2; merits and, 204-7 *passim*; proper sphere of application of, 204-7
- scope of, determined by international law, 197, 198-200
- exhaustion of local remedies and, 83
- general principles of law recognized by civilized nations, the Court and, 221-5
- Art. 38, declaratory, 222-3
- jus posteriori* and, 221-5
- good faith, principle of, the Court and, 207-16
- affirmed, 207-8
- application of, limitations, 210-16
- bad faith, inquiry into allegations of, 213-15
- reservations to the Court's jurisdiction and, 210-11
- rights, abuse of, 216
- subjective element and, 208-9
- uberrima fides* and, 211-13
- international custom as a source of law, the Court on, 229-30
- international instruments, the Court on, 230-1
- international law, supremacy of, 185-94, 197
- affirmed, 185-9: over existing domestic law, 185-7; over subsequently enacted domestic law, 187-8
- exceptions, apparent, 189-94: conflict, absence of, 192-4; Conventions, cases of, 191; treaty, cases of, 190-1, 191-2; where domestic law governs by virtue of international law, 189-90
- jus posteriori jus priori derogat*, affirmation of by the Court, 221-5
- application of, in the *Guardianship of Infants* case, 221-2, 224-5
- law, principles of, and, 222-5

International Court (*cont.*)

- limitations on the application of, 224-5
- treaties and, 221-2, 225
- nemo in re sua*, affirmation of, by the Court, 225-9
- affirmation of the fundamental nature of, 225-8
- application of, in non-judicial proceedings, 228-9
- non-liquet* and: *see Non Liquet*
- pacta sunt servanda*, 187, 194-6
  - affirmation of, by the Court, 187, 194-6
  - natural law and, 196
  - treaty obligations and, 194-5
- rules of, Art. 32, 86
- statute of:
  - Art. 36, 186
  - Art. 38, 35, 126, 129, 145-7, 158, 159-60, 221-5, 229-30
  - Art. 103, 221-2, 225
- International law: *see also* International Court of Justice
  - bona fides*: *see* good faith, principle of (below)
  - cessante ratione, cessat ipsa lex*, 216-21
    - application of the principle, 216-18
    - oral petitions, and, 216-17, 218-21
  - passim*
  - rebus sic stantibus*, principle, 217-18
  - codification of, 2, 11-16: *see also* Hague Codification Conference
  - domestic jurisdiction and, 197-207
    - determining, criteria for, 197-8
    - plea of: as a preliminary issue, 200-1; basis, 200-2
    - 'provisional' principle, 201-7: application of, 204-7; basis of, 201-2; I.C.J. and, 202-7; merits and, 204-7 *passim*
    - scope of, determined by international law, 197, 198-200
  - domestic law and:
    - moving in different fields, 188-9, 197
    - supremacy of international law over, 185-94, 197
  - expropriation in, 290-1
  - good faith, principle of, 207-16
    - affirmed, 207-8
    - bad faith, inquiry into allegation of, 213-15
    - limitations on the application of, 210-16
    - reservations to the I.C.J. jurisdiction and, 210-11
    - rights, abuse of, 216
    - subjective element and, 208-9
    - uberrima fides* and, 211-13
  - international custom and, 229-30
  - jus posteriori jus priori derogat*, 221-5

- application of, in the *Guardianship of Infants* case, 221-2, 224-5
- general principles of law and, 222-5
- limitations on the application of, 224-5
- treaties and, 221-2, 225
- law, principles of, recognized by civilized nations and: *see* General principles of law
- nemo in re sua*, 225-9
  - non-judicial proceedings and, 228-9
  - principle, fundamental, 225-8
- pacta sunt servanda*, 187, 194-6
  - affirmation of, 187, 194-6
  - natural law and, 196
  - treaty obligations and, 194-5
- principles, a summary of the main, 275-7
- supremacy of, 185-94, 197
  - exceptions, apparent, 189-94
  - over existing domestic law, 185-7
  - over subsequently enacted domestic law, 187-8
- United States, recent application of international law by, 244-52
- use of, 299-302
- International Law Commission, 3, 4, 16, 24, 105, 106, 109-21
  - continental shelf and, 105, 106, 109-21
  - boundary of, 119-20
  - installations on, 121
  - rights over, 111-12, 113-15, 117
  - Sea, Articles on the Law of, 105, 106, 109-10, 113, 116, 117, 118
- International loan agreements: *see* Loan agreements
- International Monetary and Economic Conference, 1933, 254
- International Organizations:
  - borrowing and lending by, 303-5
  - headquarters agreements, 295-6
- International Prize Court, 6-7, 11, 16
- International Settlements, Bank for, 40
- Italy, Treaty of Commerce and Navigation, 1949, 251
- Jay Treaty, 1794, 250-1
- Kellogg-Briand Pact, 256, 257
- Lauterpacht, Sir Hersch, ix-xi
- League of Nations, recognition and, 255-6
- Legitimacy Act, 1926, 59
- Lex ferenda*, 6, 7, 10, 13
- Lex lata*, 6, 7, 13
- Loan agreements, international:
  - choice of law clauses in, 38-41
  - I.C.J., clause providing for the jurisdiction of, 50-51
  - public international law and, 52-53
- Local remedies: *see* Exhaustion of local remedies

- London, Declaration of, 9-11, 13  
 London Naval Conference, 1908-9, 2, 6-11, 13, 32  
 Declaration of London, 9-11, 13  
 objectives of, document stating, 7-9  
 origins, 6-7  
*Protocole de Clôture*, 11, 32
- Marriage:  
 Law Reform (Miscellaneous Provisions) Act, 1949, 63-64  
 Matrimonial Causes Act, 1937, 63-64  
 Matrimonial Causes Act, 1950, 63-64  
 validity of, effect of retroactive changes in foreign law, 72-76  
 Meteorological Organization, World, 254  
 Monetary and Economic Conference, 1933, 254
- Municipal law:  
 choice of law:  
 clause in treaties, 38-40, 44  
 implied, 40-41  
 contracts:  
 governed by, 41-43  
 internationalization of, and, 43-44, 47-48, 50, 52, 56-57  
 rights of parties to submit to, 38-41  
 incorporation of, as distinct from choice, 38-41, 44  
 international law and, moving in different fields, 188-9, 197  
 supremacy of international law over, 185-94, 197  
 exceptions, apparent, 189-94  
 existing law, 185-7  
 subsequently enacted law, 187-8
- Naval Conference: *see* London Naval Conference
- Non liquet* and the function of law, 124-61  
 compulsory jurisdiction and, 153-4, 157-8, 161  
 declaration of *non liquet*,  
 'desirable modifications' and, 153  
*insuffisance sociale* and, 140-1, 142-4  
 international tribunals and, 125-6, 129-30, 160-1  
 obligation to declare, 139-40, 140-4, 149-58  
 'desirable modifications' and, 147-9, 152, 153, 158  
 general principles of law, and, 126, 129, 133-4, 138, 145-7, 158, 159-60  
*insuffisance sociale* and the obligation to declare *non liquet*, 140-4  
 international tribunals, competence of, and, 127, 128-9, 130, 131-3, 135-7, 159  
 justice and adequacy of rules and, 130-1  
 legal system, completeness of, and:  
 adversary principle, 134-5, 137  
 judicial competence, 131-3, 135-7  
 law, principles of, 133-4, 145, 145-7, 159  
 prohibition of *non liquet*, 128-9, 130, 130-1  
 'residual negative principle', 135-7  
 non-justiciability and, 124, 154  
 procedure, whether *non liquet* a matter of, 125, 131  
 prohibition of *non liquet*,  
 arbitral and judicial practice a 'positive rule' arising from, 124, 126, 128-9, 138-40, 142-3, 145, 158  
 'desirable modifications' and, 147-9, 152, 158  
 international tribunals and, 125-6, 128-33, 135-7, 147-53, 157-60  
 judicial and arbitral practice and, 124, 126, 128-9, 138-40, 142-3, 145, 158  
 law, principles of, and, 126, 128-9, 133-4, 138, 145-7, 158, 159-60  
 legal system, completeness of, and, 128-9, 130-1  
 third party judgment and, 154-6  
 North Atlantic Treaty, 4
- Open Sea: *see also* Continental shelf; Geneva Conference on the law of the Sea; and Territorial sea  
 Articles on the Law of, 105, 106, 109-10, 113, 116, 117, 118  
 freedom of:  
*cartaz*, the institution of, 176-80  
 Freitas on, 172-5, 180-2  
 Grotius on, 172-5, 181  
 Indian Ocean, position in the XVth cent., 170-2  
 resources, exploitation and conservation of, 293-4
- Optional Clause, 4
- Panama:  
 Canal Zone, right to air space above, 244-5  
 territorial sea, decree on the limit of, 244-5  
 Paria, Gulf of, Treaty of 1942, 102-3, 120  
 Paris, Declaration of 1856, 22-23  
 Peace: *see* Hague Peace Conferences  
 Permanent Court of International Justice:  
*see also* International Court of Justice  
*cessante ratione*, the Court and, 217  
 contracts and:  
 internationalization of, 47-48  
 proper law of, 41-42  
 domestic jurisdiction, the Court and, 197-8, 199, 201, 202, 205



- Permanent Court (*cont.*)  
 international law, supremacy of, the  
 Court and, 185-6, 192  
*nemo in re sua*, the Court and, 227-9  
*non liquet*: *see* *Non liquet*
- Persian Gulf, Proclamations by the Rulers,  
 104
- Principles of law recognized by civilized  
 nations: *see* General principles of law
- Private international law: *see* Adoption;  
 Conflict of laws; Divorce; Domicil;  
 Marriage; *and* Wills
- Prize Court, International, 6-7, 11
- Protocol, 14, 15, 28, 29, 32-33
- Recognition of States, 246-50, 252-9  
 conferences, participation in, and, 254,  
 258  
 'constitutionality' test, 248-9  
*de facto* government and, 248-9  
 government effectiveness as a ground of,  
 247, 249  
 implied, 253  
 importance of, declining, 258-9  
 international obligations and, 249-50  
 League of Nations and, 255-6  
 national policy, instrument of, 246-7,  
 250  
 non-recognition, 246-7, 250, 259  
 organizations, participation in inter-  
 national, 254-5, 256, 258  
 political, 255, 256  
 technical, 254-5  
 popular assent as a condition of, 247, 249  
 treaties and, 252-4, 255-9  
 bilateral, 253-4  
 influence of, 258-9  
 multilateral, 255-7, 258  
 reservations in, 256-7  
 United Nations and, 255-6
- Recommendation: *see* International con-  
 ferences, conclusions of
- Resolution: *see* International conferences,  
 conclusions of
- Responsibility of States:  
 aliens, injury to, 85, 86, 87, 89-92, 94-  
 98 *passim*, 100-1  
 assets, restitution of (*Interhandel* case),  
 89-92  
 Harvard Research Draft Convention,  
 85, 95, 97  
 residence within territory, whether  
 essential, 97-98  
 respondent State, link with, 94-101;  
 absence of, 97-98; voluntary, 94-  
 95, 98, 99, 100-1; when essential,  
 95, 96, 97, 98-100; when estab-  
 lished, 95-96  
 armed forces, unlawful acts of, 97  
 diplomatic protection, 282-3
- Restitution Court for Berlin, decisions on  
 immunity of embassy premises, 235-  
 40
- Rio de Janeiro, Anti-War Pact of 1933, 256
- Sea: *see* Continental shelf; Geneva Con-  
 ference on the Law of; Open sea; *and*  
 Territorial sea
- Sea-bed: *see also* Continental shelf  
 Coast Protection Act, 1949, 116  
 Crown Lands Acts, 1826-1936, 116  
 exploitation of, 102  
 occupation of, 102-3  
 Paria, Gulf of, Treaty, 1942, 102  
*res nullius*, 102, 103  
 Truman Proclamation, 1945, 102, 103-4
- Sovereignty of States:  
 Freitas on, 165-7, 167-8  
 Grotius on, 164-7
- States, 2: *see also* Recognition of States;  
 Responsibility of States; Sovereignty  
 of States; *and* State territory
- State territory, air space above, 244-6
- Suez Canal Zone, 251, 252
- Sugar Agreement, International, 1958,  
 240-4, 257-8; *see also* Commodity  
 Agreements
- Tariffs and Trade, General Agreement on,  
 241, 242
- Territorial sea:  
 Convention on, 1958, 114, 115  
 Panama Decree on, 244-5
- Tin Agreement, International, 1959, 240-  
 4; *see also* Commodity Agreements
- Treaties:  
 commercial, 34-41, 56-57  
 choice of law: clause, 38-40; implied,  
 40-41  
 examples of, 35-36  
 money, international law of, and, 36-37  
 municipal law, right of parties to sub-  
 mit, 38-41  
 payment, place of, 37  
 principles of, difficulties in ascertain-  
 ing, 35-36  
 public international law and, 34-38,  
 40-41  
 rights, assignment of, 56-57  
 rules applicable to, 36  
 inter-temporal law, application of, 250-1  
 international conferences, law relating  
 to, and, 1-2, 30-31, 32  
 international instruments,  
 when amounting to treaties, 4-6, 30  
 when not amounting to treaties, 4-6  
*jus posteriori* and, 221-2, 225  
 law of:  
 ambiguities in, 2-6  
 'treaty', meaning of the word, 2-3

Treaties (*cont.*):

- 'treaty', nature of, in the generic sense, 3-4
- well documented, 1
- pacta sunt servanda* and, 194-5
- recognition of States and, 252-9
  - bilateral treaties, 253-4
  - influence of treaties on, 258-9
  - multilateral treaties, 255-7, 258
  - reservations in treaties, 256-7
  - reservations in, 256-7, 283-5, 307-8
- Tribunals, International, 305-7; *see also* International Court of Justice; *Non liquet*; and Permanent Court of International Justice
- Truman Proclamation, 1945, 102, 103-4, 120
- United Kingdom:
  - Convention as to . . . Real and Personal Property, 1899, 250-1
  - Treaty between, and Venezuela, relating to the Gulf of Paria, 102-3, 120
- United Nations, recognition and membership of, 255-6, 258
- United Nations Organization for Food and Agriculture, 254
- United States of America:
  - Aeronautic and Space Act, 1958, National, 245-6
  - air space above its territory, statutes to clarify claims, 245-6
  - Aviation Act, 1958, Federal, 245
  - China, non-recognition of the Government of, 246-50
  - Commerce and Navigation Treaty, 1949, with Italy, 251
  - Jay Treaty, 1794, 250-1

## Panama and:

- Canal Zone, air space above, 244-5
- decree on territorial sea, 244-5
- Property, Convention as to Tenure and Disposition of, 1899, 250-1
- recognition, traditional policy, 246, 247-50
- treaties, application of the inter-temporal law to, 250-1
- Truman Proclamation, 1945, 102, 103-4, 120
- war, when considered declared, 251-2
- Universal Postal Union, 254

Venezuela, Treaty between United Kingdom and, relating to the Gulf of Paria, 102-3, 120

Vienna, Congress of, 32

*Voeu*: *see* International conferences, conclusions of

## War:

- Anti-War Pact of Rio de Janeiro, 1933, 256
- law of, modern, 296-9
- when considered declared, 251-2
- Wheat Agreement, International, 1959, 240-4: *see also* Commodity Agreements

## Wills:

- intestacy, 70-71
- property, succession to,
  - immovable, 272-3
  - movable, 67-68
- validity of, retroactive changes in foreign law and, 66-70
- World Health Organization, 254
- World Meteorological Organization, 254









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